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In The

Supreme Court of the United States

LUIS ALTAMIRANO-QUINTERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In connection with a determination whether a criminal defendant has satisfied the disclosure requirement for "safety valve" relief from mandatory minimum sentencing under 18 U.S.C. § 3553(f)(5), is the government bound by its own stipulation made in connection with the defendant's plea agreement that the defendant disclosed to the government "all relevant conduct" regarding his crime?

2. May federal courts ignore a government stipulation that the defendant has satisfied the disclosure requirement for safety valve relief from mandatory minimum sentencing under 18 U.S.C. § 3553(f)(5), and thereby deny safety valve relief, absent evidence supporting such a denial?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

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Respondent (plaintiff and appellee below):

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI

Mr. Altamirano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion (Ebel, Circuit Judge) (Appendix, infra ("App.") 1-37), filed December 28, 2007, is reported at 511 F.3d 1087. The judgment of the United States District Court for the District of Colorado, filed June 29, 2006, is unreported.

STATEMENT OF JURISDICTION

The Tenth Circuit filed its opinion on December 28, 2007. App. 1-37. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3553(f) states that a defendant convicted of conspiracy to possess controlled substances in violation of 21 U.S.C. §§ 841 and 846 must be sentenced without regard to the statutory minimum sentence if the court finds, after the government

has been afforded an opportunity to make a recommendation, that five conditions are met:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) *not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.*

(Emphasis added.) It is undisputed that Mr. Altamirano satisfied the first four conditions under § 3553(f). The fifth and final condition of the "safety valve" statute is at issue in this case.

STATEMENT OF THE CASE

1. Overview

Mr. Altamirano and a co-defendant were charged with conspiracy and possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841 and 846. App. 40-42. Mr. Altamirano pleaded guilty to the conspiracy charge. App. 43-61. The government dismissed the possession charge. *Id.* The conspiracy charge carried a mandatory minimum sentence of ten years in prison unless the "safety valve" statute (or some other applicable statute) exempted Mr. Altamirano from that statutory minimum. *See* 21 U.S.C. § 841(b)(1)(A) (establishing minimum sentence); 18 U.S.C. § 3553(f) (providing relief from minimum sentence).

Contemporaneous with the guilty plea, the government and Mr. Altamirano entered into a "Plea Agreement And Stipulation Of Facts Relating To Sentencing." App. 43-61 (the "Stipulation"). Several parts of the Stipulation are pertinent to this petition.

First, the Stipulation contained a detailed statement of "relevant facts" spelling out Mr. Altamirano's and his co-defendant's offenses and course of conduct,

including how they had come from California and were responsible for putting the drugs in the car in which it was discovered. App. 47-51. By signing the Stipulation, the Assistant United States Attorney attested to the truthfulness of these disclosures. App. 56.

Second, the Stipulation noted that Mr. Altamirano intended to participate in a debriefing before sentencing in which it was anticipated that he would provide information "about the criminal wrongdoing of other persons." App. 44-45. If Mr. Altamirano provided the anticipated information, the government expected to file a motion to reduce Mr. Altamirano's sentence pursuant to the "substantial assistance" provisions of federal sentencing law, 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. App. 45-46. Importantly, however, the Stipulation did not identify what "other persons" the debriefing would cover, much less suggest that debriefing was necessary for Mr. Altamirano to make the requisite disclosure for safety valve relief, namely all information he had about his "offense or offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(5). In fact, the parts of the Stipulation that discussed the intended debriefing did not mention the safety valve at all. *See* App. 45-46.

Third, and most critically, in discussing Mr. Altamirano's likely sentencing range, the Stipulation affirmed the completeness of his factual disclosures to the government:

> [T]he parties believe that the sentencing range resulting from the proposed plea agreement [87-108 months] is appropriate because *all relevant conduct is disclosed*; that *the stipulated facts by the parties take into account all pertinent sentencing factors with respect to this defendant*; and that the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior.

Id. at 55 (emphasis added). As explained below, this statement matches the Tenth Circuit's description of the disclosure that entitles a defendant to safety valve relief.

2. The District Court Imposes a "Mandatory" Ten-Year Sentence

Almost a year elapsed between Mr. Altamirano's guilty plea and his sentencing hearing. *See id.* 56 & 62. During that time, Mr. Altamirano decided not to participate in a debriefing. *See, e.g., id.* at 65-66. Accordingly, the government properly filed no § 5K1.1 "substantial assistance" downward departure motion.

Nevertheless, at the sentencing hearing, Mr. Altamirano's counsel argued that Mr. Altamirano was entitled to the more modest relief supplied by the safety valve (namely, relief from the mandatory minimum sentence *without* the guidelines-offense-level reduction typically associated with a § 5K1.1 departure). *Id.* at 65-67. He noted that the safety valve and substantial assistance provisions of federal

sentencing law are separate from one another, and "even though [Mr. Altamirano] did not avail himself of substantial assistance under the 5K motion, he has availed himself of the safety valve." *Id.* at 67. In the plea agreement, more particularly, Mr. Altamirano had set forth substantial factual information that satisfied the safety valve statute's disclosure requirements. *Id.* at 66. Significantly, although the government said at the sentencing hearing that it could not state "unequivocally" that Mr. Altamirano had satisfied the disclosure requirements, it did not take the position that he had not satisfied them. *Id.* at 73-74. Nor did it identify any information called for in § 3553(f)(5) that it believed Mr. Altamirano had failed to disclose. *See id.* To the contrary, the government said it did not oppose Mr. Altamirano's request for safety valve relief. *Id.*

Notwithstanding the government's lack of opposition and the fact that the government did not identify any information (or even type of information) relative to the safety valve that Mr. Altamirano failed to disclose to it, the district court rejected Mr. Altamirano's request and sentenced him to a "mandatory" ten years in prison. *Id.* at 79-80. Because Mr. Altamirano fell in the lowest criminal history category, his offense level under the Sentencing Guidelines equated to a sentencing range of 108-135 months. Applying the statutory minimum, however, the court held that the real sentencing range was 120-135 months. App. at 77. And, concluding that Mr. Altamirano did not warrant more than the statutory

minimum, the court sentenced him to ten years in prison. *Id.* at 79-80.

The district court rejected the argument that Mr. Altamirano was exempt from the mandatory minimum sentence. Its brief discussion of the issue is reproduced here in full:

> In the Plea Agreement and Stipulation of Facts Relevant to Sentencing, Court's Exhibit 1, the parties acknowledged that the defendant had expressed the intent to cooperate with the office of the United States Attorney for the District of Colorado by providing testimony, documents, and other information known to the defendant about the criminal wrongdoing of other persons.
>
> The defendant in his plea agreement agreed that he shall cooperate fully with the government in the ways prescribed in that plea agreement. Again citing to the Plea Agreement and Stipulation of Facts Relevant to Sentencing, Court's Exhibit 1, at page 2, paragraph C.
>
> In that same plea agreement, the government reserved the sole right to evaluate the nature and extent of the cooperation if any of the defendant, and to make the cooperation of the defendant, if any, known to the court at the time of sentencing.
>
> At the time of the plea agreement, the defendant had not been debriefed. At that time, the parties stipulated that the defendant would submit to a proffer or interview by

agents of the federal government between the date of the entry of the plea in June of 2005, and the first [scheduled] sentencing hearing in September of 2005.

Due to the actions of the defendant, that debriefing and that proffer did not occur. Had the defendant cooperated completely, had the defendant submitted to the debriefing and proffer included in the plea agreement, the government anticipated filing a motion under guideline Section 5K1.1, and the provisions of 18 U.S.C. Section 3553(e), requesting a downward departure for substantial assistance.

Because the defendant breached that portion of his plea agreement, the government has not filed any such motion. And there is no request to depart downward from the guideline range based on substantial assistance.

The defendant requests that he be afforded the benefits of the so-called safety valve, which implicates 18 U.S.C. Section 3553(f). In turn, subsection F of Section 3553 has five components. No. 5 is at issue in request – in the context of the request by the defendant.

Paragraph 5 of subsection F of Section 3553 provides in relevant part as follows, and I quote, "Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the

> same course of conduct or of a common scheme or plan."
>
> On this record, that fifth requirement has not been satisfied by the defendant, and therefore, the defendant is not entitled to safety valve relief under 18 U.S.C. Section 3553(f), and therefore the defendant's request for downward departure for a sentence beneath the statutory mandatory minimum should be denied.

Id. at 77-79.

As is evident, the district court did not identify any information that 18 U.S.C. § 3553(f)(5) required but Mr. Altamirano possessed and withheld from the government. Rather, it simply noted that Mr. Altamirano did not submit to the debriefing anticipated in the plea agreement (which by its terms was necessary solely to receive § 5K1.1 relief), and then said, "[o]n this record, that fifth requirement has not been satisfied by the defendant, and therefore, the defendant is not entitled to safety valve relief under 18 U.S.C. Section 3553(f)." *Id.* at 79.

3. Tenth Circuit Decision

On appeal to the Tenth Circuit, Mr. Altamirano argued, among other things, that the district court erred in holding that he failed to satisfy the disclosure requirement in 18 U.S.C. § 3553(f)(5), because (a) the government had *stipulated* in the plea agreement that Mr. Altamirano disclosed the very information

the safety valve statute requires and (b) no other evidence or district court findings contradicted that stipulation. A divided panel of the Tenth Circuit affirmed the district court's denial of safety valve relief.

The panel majority held that (1) the government did not effectively stipulate that § 3553(f)(5) had been satisfied and (2) Mr. Altamirano did not make the disclosure required by the statute, i.e., "all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." App. 6-7. With regard to the first point, the majority held that Mr. Altamirano could not reasonably have understood the plea agreement to stipulate that he had satisfied the requirements of § 3553(f)(5) because (1) the paragraph of the plea agreement in question concerned the application of the sentencing guidelines and did not explicitly refer to the safety valve; (2) the language in the plea agreement is "standard language" prescribed by local rule; and (3) the language of the plea agreement contemplated that there would be additional information that the Court would consider at sentencing. App. 21-23.

With respect to the second issue, the Tenth Circuit concluded that the district court did not clearly err in finding that Mr. Altamirano failed to disclose all information and evidence he had concerning his offense or offenses that were part of the same course of conduct or of a common scheme or plan. App. 24-27. The Court determined, even though the

district court did not so find, that there were "information gaps" in Mr. Altamirano's plea statement. And, although the Tenth Circuit previously conceded that a government debriefing was not necessary to obtain safety valve relief, it noted that Mr. Altamirano had initially intended to, but later did not, provide "substantial assistance" to the government. App. 26-27.

Judge Holmes concurred in the Court's judgment, but disagreed with the majority on the legal effect of the Government's stipulation in the plea agreement that Mr. Altamirano had disclosed "all relevant conduct." Judge Holmes stated that the majority opinion "*run[s] counter to, and undermine[s], our settled precedent concerning the interpretation of both the Sentencing Guidelines and plea agreements.*" App. 28 (emphasis added). He explained that the government conceded through its "all relevant conduct" stipulation that Mr. Altamirano satisfied the safety valve's disclosure requirement, and that Mr. Altamirano reasonably could have understood the government to have made such a concession in the Plea Agreement. App. 30. He noted that "relevant conduct" is a term of art in criminal sentencing, and that a criminal defendant could reasonably believe that this term is sufficient to be construed as a stipulation that he had satisfied the § 3553(f)(5) standard for Guidelines purposes. App. 31-32. Like the majority, however, Judge Holmes further concluded that the district court was "free to disregard the government's concession in favor of other evidence

bearing on the subject," and did not err in finding that Mr. Altamirano failed to satisfy the safety valve disclosure provision. App. 29-30. Significantly, Judge Holmes did not identify what the evidence supporting a denial supposedly was, and, indeed, none exists.

REASONS FOR GRANTING THE WRIT

A. The Government Should Be Bound By Its Stipulations That A Defendant Has Satisfied The Disclosure Requirement For "Safety Valve" Relief

This Court should grant certiorari because the law established by the Tenth Circuit in this case – that in connection with a determination whether a criminal defendant has satisfied the disclosure requirements for "safety valve" relief from mandatory minimum sentencing under 18 U.S.C. § 3553(f)(5), the government is not bound by its own Stipulation in a plea agreement that the defendant disclosed "all relevant conduct" – contravenes important legal principles established by this Court. This Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). "[W]hen the government fails to fulfill a material term of a plea agreement, the defendant may seek specific performance." *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir 1996); *see also United States v. Barresse*,

115 F.3d 610, 612 (8th Cir. 1997) (if a promise to file a downward departure motion was "part of the inducement or consideration underlying a guilty plea, its breach will entitle defendant to relief"). The law the Tenth Circuit created in this case in respect to the safety valve statute violates these basic principles.

To satisfy § 3553(f)(5), a defendant concededly must do more than disclose information about his own offense. By its terms, the statute also requires disclosure of all information the defendant has concerning "offenses that were part of the same course of conduct or of a common scheme or plan." § 3553(f)(5). The statute does not define what constitutes "offenses that were part of the same course of conduct or of a common scheme or plan." But the elements of § 3553(f)(5) are replicated in U.S.S.G. § 5C1.2. And the application notes to that guidelines section define the defendant's "offense and offenses that were part of the same course of conduct or of a common scheme or plan" as "the offense of conviction and *all relevant conduct*." § 5C1.2, cmt. n.3 (emphasis added). "Relevant conduct" is a term of art under the sentencing guidelines. *See* U.S.S.G. § 1B1.3. Based on these application notes and using this term of art, the Tenth Circuit previously held that a defendant complies with § 3553(f)(5) when he discloses all information he has concerning "the offense of conviction and *all relevant conduct*." *See, e.g., United States v. Stephenson*, 452 F.3d 1173, 1180 (10th Cir. 2006) (emphasis added).

When the government stipulates in a plea agreement that a criminal defendant indeed disclosed "all relevant conduct" concerning his crime, that standard plainly is satisfied. And that is exactly what happened here. As explained, the parties' Stipulation contained a detailed statement of facts regarding Mr. Altamirano's offense, including his dealings with his co-defendant. *See* App. 47-51. Based on these facts, the parties predicted a guidelines sentencing range of 87-108 months, materially below the "mandatory" 120 months to which Mr. Altamirano was sentenced. *Id.* at 54.

The Stipulation said in pertinent part:

> [T]he parties believe that the sentencing range resulting from the proposed plea agreement is appropriate because *all relevant conduct* is disclosed; that the stipulated facts by the parties take into account all pertinent sentencing factors with respect to this defendant; and that the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior.

App. 55 (emphasis added).

The government lawyers who prepared, signed, and filed the Stipulation surely were aware of the federal sentencing guidelines and sentencing law. Those authorities make absolutely clear that the pertinent sentencing factors with respect to a defendant include not only the defendant's actual offense, but all "relevant conduct" relative to the offense. *See,*

e.g., *United States v. Clark*, 415 F.3d 1234, 1240 (10th Cir. 2005) (holding that sentencing offense level should be determined from all drug quantities stemming from defendant's "relevant conduct"); *United States v. Williams*, 292 F.3d 681, 685 (10th Cir. 2002) (holding that sentence should be based on "relevant conduct"). The authorities further make clear that "relevant conduct" for sentencing purposes includes, not only the defendant's own offense, but offenses that were part of the same course of conduct or of a common scheme or plan. *See, e.g.*, *Clark*, 415 F.3d at 1240 ("Whether a specific offense constitutes relevant conduct to the offense of conviction depends in substantial part on whether the offenses form the 'same course of conduct'. . . ."); *Williams*, 292 F.3d at 685 (holding that district court must consider "relevant conduct that was 'part of the same course of conduct or common scheme or plan as the offense of conviction'") (quoting U.S.S.G. § 1B1.3(a)(2)); U.S.S.G. § 1B1.3 (describing "Relevant Conduct" as among "Factors that Determine the Guideline Range"; defining it to include acts and omissions that were part of "the same course of conduct or common scheme or plan as the offense of conviction"); *id.* U.S.S.G. § 1B1.1 cmt. n.1(H) (defining "offense" generally to include the offense of conviction and "all relevant conduct under § 1B1.3"); *id.* U.S.S.G. § 1B1.2 (directing that the applicable guideline range be determined "in accordance with § 1B1.3 (Relevant Conduct)"); *see also* §§ 2D1.1(5), 2D1.11, 2D1.12(b)(3), 2S1.1(a)(1), 3C1.1 & 6B1.2(a).

The Tenth Circuit majority erroneously held that the government was not bound by its "all relevant conduct" stipulation. The majority reasoned that "the paragraph in the plea agreement on which Altamirano-Quintero relies does not address 18 U.S.C. 3553(f) at all, but instead clearly concerns the application of the sentencing guidelines to Altamirano-Quintero." App. 16. But the fact that § 3553(f) is not mentioned does not mean that the Government is not stipulating that "all relevant conduct" had been disclosed. As Judge Holmes explained in his concurring opinion, the majority's

> analysis rests on the faulty assumption that the term 'relevant conduct' means something different when calculating an advisory Guideline sentence than it does when determining whether a defendant is entitled to safety valve relief. The plain language of the Guidelines undercuts the majority's tacit assumption, and therefore weakens its rationale.

App. 31. Indeed, the term "relevant conduct" is expressly defined by the Guidelines, and must therefore be afforded the same meaning each time it appears in the statute. *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1175 (10th Cir. 2004) (when a technical term is used in a statute, "it is presumed . . . that the term [has] the same meaning in each of the sections or subsections"); *United States v. Perez*, 366 F.3d 1178, 1182 (11th Cir. 2004) ("Where the same language appears in two guidelines, it is generally

presumed that the language bears the same meaning in both."). Because "relevant conduct" means the same thing throughout the Guidelines, the majority's attempt to limit the scope of the government's chosen language solely to the calculation of the advisory sentencing range is erroneous. As stated by Judge Holmes, "relevant conduct" means the same for calculation of the advisory sentencing range as it does for application of the safety valve. App. 33. As such, the stipulation that "all relevant conduct" had been disclosed was an admission by the government that Mr. Altamirano satisfied the "safety valve" requirements under § 3553(f)(5).

The majority said that Mr. Altamirano could not reasonably have understood the plea agreement to be a stipulation of adequate disclosure because "the plea agreement clearly contemplates that there would be additional information that the court would consider at sentencing." App. 22-23. This, however, conflates the requirements for a "substantial assistance" downward departure under U.S.S.G. § 5K1.1 with the more modest disclosure requirements of 18 U.S.C. § 3553(f)(5). As explained, the Stipulation anticipated that Mr. Altamirano would participate in a debriefing "*in order to receive a § 5K1.1 motion.*" *Id.* at 44-45 (emphasis added). As the government concedes, the information Mr. Altamirano had to provide to qualify for a § 5K1.1 motion differs from that necessary to qualify for safety valve relief. *See id.* at 73-74. Nothing in the record suggests that the information Mr. Altamirano would have discussed in a debriefing

would have had anything to do with "offenses that were part of the same course of conduct or of a common scheme or plan" as Mr. Altamirano's offense (the subject pertinent to the safety valve), as opposed to other wrongdoings about which Mr. Altamirano was aware (which might have supported a substantial-assistance departure). It is simply not true, therefore, that Mr. Altamirano must have had "information concerning the actions of others in this drug conspiracy." Indeed, the government lawyers in the district court *knew* that Mr. Altamirano had changed his mind about a debriefing and still did not dispute that he provided the government with the information the safety valve statute requires. As Judge Holmes explained:

> the informational requirements of the safety valve provision and the substantial assistance provision are not coterminous. Accordingly, if Mr. [Altamirano] had in fact followed the path anticipated by the Plea Agreement and sought substantial assistance relief, he could quite conceivably have provided the government . . . with additional information concerning the illegal activities of others that would not have fallen within the scope of relevant conduct of his offense (i.e., outside of the universe of information that he was required to disclose to obtain safety valve relief.)

App. 36-37, n.6.

By holding that the government's stipulation that a defendant disclosed "all relevant conduct" for purposes of sentencing is not, in sum and substance, a stipulation that the defendant satisfied the disclosure requirement of the safety valve statute, the Tenth Circuit exempted without justification an entire class of cases from the fundamental principle that a defendant is entitled to rely on the government's representations in connection with a plea agreement. *Santobello*, 404 U.S. at 262. This Court should grant certiorari to make clear that the government cannot stipulate in a plea agreement that a criminal defendant has disclosed the very information the courts have said § 3553(f)(5) requires, then evade that stipulation when determining the defendant's eligibility for safety valve relief.

B. The Courts May Not Ignore A Stipulation By The Government That The Defendant Has Satisfied The Disclosure Requirement For Safety Valve Relief, And Thereby Deny Safety Valve Relief, Absent Evidence Supporting Such A Denial

The majority's error in holding that the government was not bound by its stipulation that Mr. Altamirano disclosed "all relevant conduct" in respect to his offense was especially significant because no countervailing evidence supported a conclusion that the stipulation was erroneous. The Court should also grant certiorari to make clear that courts cannot

ignore a stipulation and deny a defendant safety valve relief absent *evidence* supporting such a denial.

The Tenth Circuit held that, if there was a government stipulation, the district court was free to disregard it. App. 29. That can be true, however, only if *evidence* exists supporting a finding that the defendant possessed information which § 3553(f)(5) required be disclosed and he did not disclose it.

The law binds courts to base decisions on the evidence presented, not unsupported opinion. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 4 (1978) (finding that double jeopardy attached when a court of appeals determined that the trial court convicted defendant based on insufficient evidence); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-91 (1977) (vacating a judgment on damages because it was not supported by the evidence). The *only* evidence in the record regarding the extent of Mr. Altamirano's disclosure was the parties' joint representation that the information disclosed in the Stipulation constituted "all relevant conduct" pertinent to his sentencing and "t[ook] into account all pertinent sentencing factors with respect to this defendant." In these circumstances, the law compels the conclusion that the safety valve applies.

At the sentencing hearing, neither the government nor the district court came up with any information Mr. Altamirano allegedly had concerning "the offense of conviction and all relevant conduct" that he failed to disclose to the government, because any such

assertion would have been inconsistent with the government's own stipulation that "all relevant conduct" already was disclosed. App. 79-80.[1]

The Tenth Circuit endeavored to identify deficiencies in Mr. Altamirano's disclosures that the district court did not. But this was pure guesswork. For instance, the Tenth Circuit said that Mr. Altamirano "does not indicate how or where he got the methamphetamine, or what he intended to do with it." App. 25. It also said that "where, as here, a defendant pleads guilty to conspiring with his co-defendant . . . the defendant does not comply with § 3553(f)(5) without identifying the other participants in the conspiracy, or at least explaining why he is unable to identify those other participants." App. 26 (citing *Stephenson*, 452 F.3d at 1180-81; *Virgen-Chavarin*, 350 F.3d at 1130; *United States v. Acosta-Olivas*, 71 F.3d 375, 377-78 (10th Cir. 1995)). But minor players like Mr. Altamirano often do not know the kind of information the Tenth Circuit now requires. *See, e.g.*, *United States v. Leos-Quijada*, 107 F.3d 786, 790 (10th Cir. 1997) (noting testimony of narcotics officer that "in his experience [drug] mules commonly do not know the people that are coming to pick up the load."); *United States v. Sherpa*, 97 F.3d 1239, 1245-46 (9th

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[1] As stated, the district court merely made the conclusory statement that Mr. Altamirano did not meet the § 3553(f)(5) requirements without expounding further. The government made no comment at all regarding the sufficiency of Mr. Altamirano's disclosure.

Cir. 1996) (applying safety valve because defendant was "culturally sheltered in such a way as to prevent his awareness of the questionable nature of his task"). To rigidly require this kind of information would frustrate the very purpose of § 3553(f), which states that "the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with [the disclosure] requirement." § 3553(f)(5). Moreover, the Tenth Circuit's requirement that defendants explain why they do *not* have additional information is directly contrary to the statute, which requires only that they provide the information they *do* have. This new judicial requirement is particularly insidious when, as here, the defendant could not have known that he needed to explain why he did not have additional information, since the government stipulated that he had disclosed all relevant conduct. This Court, therefore, should grant certiorari to make clear that courts may not reject a government stipulation that benefits the defendant absent evidence undermining the validity of that stipulation.

C. The Tenth Circuit's Erroneous Decision Impacts Numerous Criminal Defendants Who Enter Into Plea Agreements

The Tenth Circuit's opinion in this case is not a one-off decision that affects only Mr. Altamirano. Rather, it has far-reaching implications that will

potentially impact thousands of criminal defendants who enter into plea agreements each year.[2] Over 95% of all criminal defendants enter guilty pleas and have their cases disposed before trial. United States Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2006), *available at* http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm. As stated by Judge Holmes in his concurrence, "the [Tenth Circuit] majority's tortuous efforts to overcome Mr. Altamirano-Quintero's reasonable arguments in favor of a government concession are not only unpersuasive, but also impose an unacceptable cost. Specifically, they run counter to, and undermine, our settled precedent concerning the interpretation of both the Sentencing Guidelines and plea agreements." App. 28. And stipulations like the relevant one in this case appear in many plea agreements.

If a defendant cannot rely on stipulations made by the government in his or her plea agreements, the plea bargain system, so crucial to the efficient functioning of the criminal justice system, will be undermined.

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[2] The Bureau of Justice Statistics shows that over 76,000 cases in the Federal Justice System are disposed by plea agreements each year. *Bureau of Justice Statistics, Federal Justice Statistics Resource Center* (2006), *available at* http://fjsrc.urban.org/analysis/ez_displays/s_freq.cfm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 26, 2008.

Respectfully submitted,

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Luis Altamirano-Quintero

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS ALTAMIRANO-QUINTERO, Defendant-Appellant.	No. 06-1254

Appeal from the United States District Court for the District of Colorado (D.C. No. 04-cr-188-REB

(Filed Dec. 28, 2007)

Paul H. Schwartz, Cooley Godward Kronish LLP, Broomfield, Colorado, for Defendant-Appellant Luis Altamirano-Quintero.

Martha A. Paluch, Assistant United States Attorney (Troy A. Eid, United States Attorney, with her on the brief) for Plaintiff-Appellee United States of America.

Before **TYMKOVICH**, **EBEL** and **HOLMES**, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant Luis Altamirano-Quintero appeals the district court's imposition of a statutory mandatory minimum ten-year sentence for his drug conspiracy conviction. Altamirano-Quintero asserts that the district court should have applied 18 U.S.C. § 3553(f)'s safety valve to impose a sentence less than the mandatory minimum. The district court, however, determined that Altamirano-Quintero was not eligible for the safety valve because he had not provided the Government with all the information he had concerning his offense. That determination was not in error. Having jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, we therefore AFFIRM.

I. BACKGROUND

Law enforcement officials found over 670 grams of a substance containing methamphetamine in Altamirano-Quintero's car. As a result, he and a companion, his co-defendant, were arrested for drug trafficking. Altamirano-Quintero pled guilty to one count of conspiring to possess, with the intent to distribute, 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846, in exchange for the Government's agreement to

drop a second charge.[1] Altamirano-Quintero faced a statutory mandatory minimum ten-year sentence for this conviction. *See* 21 U.S.C. § 841(b)(1)(A)(viii).[2]

Altamirano-Quintero had two means available to him to avoid that mandatory minimum ten-year sentence. First, his plea agreement anticipated that he would be debriefed by, and would cooperate with, the Government. If, as a result, he provided the Government with "substantial assistance," then the Government agreed to move, under U.S.S.G. § 5K1.1[3]

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[1] 21 U.S.C. § 841(a)(1) makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance." Under 21 U.S.C. § 812(a), (c) (Schedule III) (a)(3), "[a]ny substance (except an injectable liquid) which contains any quantity of methamphetamine," is a controlled substance. And 21 U.S.C. § 846 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

[2] Section 841(b)(1)(A)(viii) provides that anyone committing a drug offense involving "500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . . shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life."

[3] Section 5K1.1 specifically provides that,

> [u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(Continued on following page)

and 18 U.S.C. § 3553(e),[4] for a downward departure at sentencing. Such a motion would have enabled the court to impose a sentence below the mandatory minimum ten-year sentence, *see* 18 U.S.C. § 3553(e),

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> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

In sentencing Altamirano-Quintero, the district court used the 2004 sentencing guidelines. At the time of sentencing, however, in June 2006, the 2005 guidelines were in effect. *See* U.S.S.G. § 1B1.11 (providing that the court shall use guidelines in effect on date of sentencing, unless doing so would violate the Constitution's Ex Post Facto Clause). In this case, however, Altamirano-Quintero concedes that there is no difference between the two guideline versions that is relevant to the issues he presents on appeal.

[4] Section 3553(e) provides, in relevant part, that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

and below the advisory guideline range, *see* U.S.S.G. § 5K1.1. *See United States v. Belt,* 89 F.3d 710, 714 n.5 (10th Cir. 1996).

Second, Altamirano-Quintero could qualify for the statutory safety valve that 18 U.S.C. § 3553(f) provides from mandatory minimum sentencing. Section 3553(f) permits the district court to disregard a statutory mandatory minimum sentence and instead impose a sentence within the advisory sentencing guidelines range, if the defendant meets five criteria.[5] The only one of those criteria at issue in this

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[5] Section 3553(f) provides:

> Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) . . . , the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or in uce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense,

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case is § 3553(f)(5)'s requirement that Altamirano-Quintero "truthfully provide[ ] to the Government all information and evidence [he] ha[d] concerning the offense or offenses that were part of the same course

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> as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f); *see also* U.S.S.G. § 5C1.2(a) (similarly providing that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)"). "If the district court makes these five findings, the defendant is eligible instead for the [advisory sentencing] range proscribed by the United States Sentencing Guidelines." *United States v. Cousins*, 455 F.3d 1116, 1124 (10th Cir.), *cert. denied*, 127 S. Ct. 162, 706 (2006). In addition, he will be eligible for a two-level decrease in his offense level as calculated under the guidelines. *See* U.S.S.G. § 2D1.1(b)(7). In this case, the parties agree that Altamirano-Quintero satisfied the first four 18 U.S.C. § 3553(f) factors.

of conduct or of a common scheme or plan."[6] 18 U.S.C. § 3553(f)(5).

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[6] Although these statutory and guideline provisions provide two methods by which a defendant can avoid a statutory mandatory minimum sentence, these two methods provide two very different means to do so. *See United States v. Acosta-Olivas*, 71 F.3d 375, 379 (10th Cir. 1995) (noting "[s]ection 5K1.1 concerning substantial assistance operates very differently from § 5C1.2," the guidelines' safety valve provision).

If a defendant provides "substantial assistance," 18 U.S.C. § 3553(e) permits the district court to impose a sentence below the statutory mandatory minimum, while U.S.S.G. § 5K1.1 permits the district court, for the same reason, to impose a sentence below the advisory guideline range. *Cf. Belt*, 89 F.3d at 714 & n.5 (case decided prior to *United States v. Booker*, 543 U.S. 220 (2005), treating guideline range as mandatory). The safety valve, on the other hand, only permits the district court to impose a sentence below the statutory mandatory minimum sentence, but still within the advisory guideline range (absent other factors that might warrant the district court imposing a below-guideline sentence). *See* 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2; *cf. Belt*, 89 F.3d at 714 & n.5 (pre-*Booker* case treating guideline range as mandatory).

Further, in order to obtain the benefit of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, a defendant must provide the government with "*substantial* assistance in the investigation or prosecution of another person." 18 U.S.C. § 3553(e) (emphasis added). If he does, the Government can move for such a departure, *see* 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1; *see also Acosta-Olivas*, 71 F.3d at 379, but that motion is ordinarily left to the Government's discretion (unless the Government gives up that discretion as part of a plea agreement). *See United States v. Courtois*, 131 F.3d 937, 938-39 (10th Cir. 1997). Upon the Government's motion, the sentencing court can depart below the statutory mandatory minimum, and below the advisory guideline range, but only after the court considers "the significance and usefulness of the defendant's assistance," as well as the timeliness,

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After he pled guilty, Altamirano-Quintero decided not to be debriefed by the Government. At sentencing, therefore, the Government did not make any motion under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. Defense counsel acknowledged that the Government's decision not to make such a motion was warranted under the circumstances. Nevertheless, counsel argued that Altamirano-Quintero still qualified for the safety valve under 18 U.S.C. § 3553(f), based

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nature, extent, truthfulness, completeness and reliability of the defendant's assistance and any injury or risk of injury the defendant suffered as a result of his cooperation with the Government. *See* 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1.

To satisfy the safety valve, on the other hand, a defendant has to meet the other four statutory criteria (no more than one criminal history point, no use or credible threat of use of violence or a firearm or other dangerous weapon in committing the relevant offense, the offense did not result in death or serious bodily injury to any person, and the defendant was not a leader or organizer of the criminal endeavor), in addition to giving the Government all of the information he has concerning his "offense or offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f). But, unlike 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, the fact that "the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude" him from satisfying the requirements for the application of the safety valve. 18 U.S.C. § 3553(f)(5); *see also Acosta-Olivas*, 71 F.3d at 379. Moreover, if the defendant satisfies these criteria for the safety valve, it is unnecessary for the Government to make a motion for a sentence less than the statutory mandatory minimum; the defendant is, instead, entitled to that relief. *See* 18 U.S.C. § 3553(f); *see also Acosta-Olivas*, 71 F.3d at 379.

upon the facts Altamirano-Quintero had admitted in his plea agreement.

The district court, however, found that Altamirano-Quintero was not eligible for the safety valve:

> Paragraph 5 of subsection F of Section 3553 provides in relevant part as follows, and I quote, "Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."
>
> On this record, that fifth requirement has not been satisfied by the defendant, and therefore, the defendant is not entitled to safety valve relief under 18 U.S.C. Section 3553(f), and therefore the defendant's request for downward departure for a sentence below the statutory minimum should be denied.

The court then sentenced Altamirano-Quintero to the statutory mandatory minimum 120 months' imprisonment.

II. DISCUSSION

On appeal, Altamirano-Quintero challenges only the district court's imposition of the mandatory minimum ten-year sentence, arguing that the district

court erred in finding him ineligible for the safety valve. In support of that contention, he asserts three arguments, which are addressed below.

A. Whether the district court erred as a matter of law in concluding Altamirano-Quintero was not eligible for the safety valve solely because he was not debriefed by the Government.

Altamirano-Quintero first argues that the district court incorrectly held, as a matter of law, that the safety valve provision *required* that he submit to a Government debriefing. This court reviews *de novo* the district court's statutory interpretation of the safety-valve provision. *See United States v. Stephenson,* 452 F.3d 1173, 1180 (10th Cir. 2006).

Both Altamirano-Quintero and the Government agree that § 3553(f)(5) does not specifically *require* that a defendant undergo a government debriefing.[7]

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[7] 18 U.S.C. § 3553(f)(5) does not specifically mention debriefing. Rather, it only requires that "the defendant . . . truthfully provide[ ] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." *Id.* Section 3553(f) does not further prescribe how the defendant must convey this information to the Government. *See United States v. Montanez,* 82 F.3d 520, 522-23 (1st Cir. 1996). There may be many ways that a defendant could provide the Government with information sufficient to satisfy § 3553(f)(5). *See Stephenson,* 452 F.3d at 1179-81 (defendant attempted to satisfy § 3553(f)(5) through a "proffer letter" sent to

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See also United States v. Montanez, 82 F.3d 520, 522-23 (1st Cir. 1996) (drawing this same conclusion). But in this case, the district court did not hold that § 3553(f) required such a debriefing.

At sentencing, the district court first addressed whether the Government would file a motion under U.S.S.G. § 5K1.1. The court specifically noted that

> [i]n the Plea Agreement and Stipulation of Facts Relevant to Sentencing, . . . the parties acknowledged that the defendant had expressed the intent to cooperate with the office of the United States Attorney for the District of Colorado by providing testimony, documents, and other information known to the defendant about the criminal wrongdoing of other persons.
>
> The defendant in his plea agreement agreed that he shall cooperate fully with the government in the ways described in that plea agreement. . . .
>
> In that same plea agreement, the government reserved the sole right to evaluate

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the government, but failed to include all the information he had); *id.* at 1181-82 (considering whether the defendant ever requested an interview with the Government); *United States v. Virgen-Chavarin*, 350 F.3d 1122, 1130 (10th Cir. 2003) (defendant provided affidavit, but failed to provide complete information); *United States v. Gama-Bastidas*, 142 F.3d 1233, 1243 (10th Cir. 1998) (holding defendant's attempt to provide government with information in the judge's chambers immediately before sentencing was "not too late") (quotation omitted).

> the nature and extent of the cooperation if any of the defendant, and to make the cooperation of the defendant, if any, known to the court at the time of sentencing.
>
> At the time of the plea agreement, the defendant had not been debriefed. At that time, the parties stipulated that the defendant would submit to a proffer or interview by agents of the federal government between the date of the entry of the plea in June 2005, and the first [scheduled] sentencing hearing in September of 2005.
>
> Due to actions of the defendant, that debriefing and that proffer did not occur. Had the defendant cooperated completely, had the defendant submitted to the debriefing and proffer included in the plea agreement, the government anticipated filing a motion under guideline Section 5K1.1, and the provisions of 18 U.S.C. § 3553(e), requesting a downward departure for substantial assistance.
>
> Because the defendant breached that portion of his plea agreement, the government has not filed any such motion. And there is no request to depart downward from the guideline range based on substantial assistance.

The district court then immediately, but separately, turned to the question of whether Altamirano-Quintero was eligible for the 18 U.S.C. § 3553(f) safety valve.

> The defendant requests that he be afforded the benefits of the so-called safety valve, which implicates 18 U.S.C. Section 3553(f). In turn, subsection (f) of Section 3553 has five components. No. 5 is at issue . . . in the context of the request by the defendant.
>
> Paragraph 5 of subsection F of Section 3553 provides in relevant part as follows, and I quote, "Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."
>
> On this record, that fifth requirement has not been satisfied by the defendant, and therefore, the defendant is not entitled to safety valve relief under 18 U.S.C. Section 3553(f), and therefore the defendant's request for downward departure for a sentence below the statutory minimum should be denied.

Contrary to Altamirano-Quintero's argument on appeal, the district court did not specifically hold that § 3553(f)(5), as a matter of law, *requires* a debriefing. Therefore, the district court did not, as a factual matter, commit the error asserted by Altamirano-Quintero of requiring a debriefing with the Government before Altamirano-Quintero could qualify for the § 3553(f) safety valve.

B. Whether the Government conceded in the plea agreement that Altamirano-Quintero had already complied with § 3553(f)(5) based upon the facts he admitted in the plea agreement.

Altamirano-Quintero next argues that the Government stipulated, in the plea agreement, that he had, at the time he pled guilty, already complied with § 3553(f)(5)'s requirement that he truthfully disclose all the information that he had regarding his offense. We disagree.

This court reviews the terms of the plea agreement *de novo*.[8] *See United States v. Rodriguez-Delma*, 456 F.3d 1246, 1250 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 1338 (2007). In interpreting a plea agreement, we apply "[g]eneral principles of contract law . . . , looking to the [agreement's] express language and construing any ambiguities against the government as the drafter of the agreement." *Id.* at 1250-51

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[8] Altamirano-Quintero never argued at sentencing that the Government had, in the plea agreement, stipulated that he had already satisfied § 3553(f)(5). This might suggest our review should instead be for plain error. *See* Fed. R. Crim. P. 52(b). Nevertheless, in the analogous situation where a defendant fails to object to the Government's breaching a plea agreement at the time the breach occurs, this court still reviews the terms of the plea agreement *de novo*. *See United States v. Rodriguez-Delma*, 456 F.3d 1246, 1250 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 1338 (2007); *United States v. Werner*, 317 F.3d 1168, 1169 (10th Cir. 2003); *United States v. Peterson*, 225 F.3d 1167, 1170 (10th Cir. 2000) (on reh'g). We follow that reasoning in this case and interpret the plea agreement here *de novo*.

(quotation omitted); *see also United States v. Bunner,* 134 F.3d 1000, 1003 (10th Cir. 1998). "The plea agreement must be construed according to what [the] defendant reasonably understood at the time he made the agreement." *United States v. Prince,* 204 F.3d 1021, 1023 (10th Cir. 2000).

The plea agreement Altamirano-Quintero had with the Government contained five sections.[9] The first section stated the "Plea Agreement"; the second set forth the statutory penalties that Altamirano-Quintero faced by pleading guilty to the drug conspiracy count; the third set forth the parties' "Stipulation to Relevant Facts" underlying Altamirano-Quintero's guilty plea; and the fourth section estimated how the guidelines might apply, predicting Altamirano-Quintero would be subject to an advisory sentencing range of between 87 and 108 months, were he not subject to the statutory mandatory minimum ten-year sentence. The plea agreement's fifth and final section was entitled "Why the Proposed Plea Disposition is Appropriate." In the first paragraph of that two-paragraph section,[10] the plea agreement stated:

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[9] The general format of a plea agreement in the District of Colorado is prescribed by the District's Local Rule 11.1(C) and Appendix J.

[10] The second paragraph of this final section asserted that the agreement stated the parties' entire agreement.

> The parties believe that the sentencing range resulting from the plea agreement is appropriate because *all relevant conduct is disclosed;* that the stipulated facts by the parties take into account *all pertinent sentencing factors* with respect to this defendant; and that the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior.

(Emphasis added.)

Based upon this language in the last section, Altamirano-Quintero argues on appeal that the Government conceded in the plea agreement that he had already satisfied § 3553(f)(5)'s requirement that he "truthfully provide[ ] to the Government all information and evidence [he] has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." We reject Altamirano-Quintero's interpretation of the plea agreement.

The paragraph in the plea agreement on which Altamirano-Quintero relies does not address 18 U.S.C. § 3553(f) at all, but instead clearly concerns the application of the sentencing guidelines to Altamirano-Quintero.[11] This is logical because this fifth

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[11] The language of this paragraph tracks U.S.S.G. § 6B1.2, which requires that, before accepting a plea agreement in which the Government has agreed to drop a pending charge, a court must satisfy itself that the agreement still reflects the seriousness of

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section of the plea agreement immediately follows the fourth section's estimation of the advisory sentencing range to which Altamirano-Quintero would be subject.

Moreover, the particular phrases in the agreement to which Altamirano-Quintero cites in support of his interpretation – "[t]he parties believe that the sentencing range resulting from the proposed plea agreement is appropriate because all relevant conduct is disclosed" and "the stipulated facts by the parties take into account all pertinent sentencing factors with respect to this defendant"–directly concern the "relevant conduct" on which the sentencing *guidelines* calculate an advisory sentencing range. *See* U.S.S.G. § 1B1.3. More specifically, the guidelines

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the defendant's offense and will not undermine the statutory purposes of sentencing:

> In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges ([Fed. R. Crim. P.] 11(c)(1)(A)), the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.
>
> However, a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

calculate a defendant's offense level based on his "relevant conduct," which in pertinent part, includes the following:

> *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for the offense;
>
> . . . .
>
> (3) all harm that resulted from the acts and omissions specified in subsection[ ](a)(1)

> . . . above, and all harm that was the object of such acts and omissions; and
>
> (4) any other information specified in the applicable guideline.

U.S.S.G. § 1B1.3.

Relevant conduct for sentencing purposes, therefore, "comprises more, often much more, than the offense of conviction itself, and may include uncharged and even acquitted conduct." *United States v. Allen*, 488 F.3d 1244, 1254-55 (10th Cir. 2007). This relevant conduct, however, still "must relate to the offense of conviction." *Id.* at 1255. And where, as here, the offense of conviction involves criminal activity undertaken jointly with others, the relevant conduct includes "'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" *Stephenson*, 452 F.3d at 1180 (quoting U.S.S.G. § 1B1.3(a)(1)(B)).

Courts addressing the requirements for a defendant to meet the safety valve under 18 U.S.C. § 3553(f) have incorporated the sentencing guidelines' concept of relevant conduct. *See Stephenson*, 452 F.3d at 1180; *see also Virgen-Chavarin*, 350 F.3d at 1130. Thus, this court has held that § 3553(f)'s requirement that a defendant "provide . . . the Government [with] all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," 18 U.S.C. § 3553(f)(5), "is defined as 'the offense of conviction and all relevant conduct,'"

Stephenson, 452 F.3d at 1180 (quoting U.S.S.G. § 5C1.2, cmt. n. 3); *see also Virgen-Chavarin,* 350 F.3d at 1130. Thus, the offense of conviction and the related relevant conduct establish the parameters of the criminal activity about which a defendant must give the Government all the information he has in order to qualify for the safety valve under 18 U.S.C. § 3553(f). *See Stephenson,* 452 F.3d at 1180; *Virgen-Chavarin,* 350 F.3d at 1129-30; *Acosta-Olivas,* 71 F.3d at 377-78; *see also United States v. Sanchez,* 475 F.3d 978, 981 (8th Cir. 2007); *United States v. Montes,* 381 F.3d 631, 635-36 (7th Cir. 2004); *United States v. Johnson,* 375 F.3d 1300, 1302-03 (11th Cir. 2004) (per curiam); *United States v. Salgado,* 250 F.3d 438, 459 (6th Cir. 2001); *United States v. Cruz,* 156 F.3d 366, 371 (2d Cir. 1998); *United States v. Miller,* 151 F.3d 957, 958, 959-61 (9th Cir. 1998); *United States v. Sabir,* 117 F.3d 750, 753 (3d Cir. 1997).

The plea agreement's indication in this case that "all relevant conduct" has been disclosed sets the parameters for the criminal activity about which the safety valve required Altamirano-Quintero to give the Government all the information he had. But this language in the plea agreement did not further indicate that Altamirano-Quintero had already provided the Government with that information. *Cf. Stephenson,* 452 F.3d at 1180-81 (noting the relevant conduct about which the defendant was required to inform the Government, in order to qualify for the safety valve, included the drug trafficking the defendant undertook jointly with co-conspirators, but

upholding the district court's factual finding that the defendant had failed to give the Government all of the information he had about that jointly undertaken conduct).

Our conclusion here is bolstered by two facts. First, and most telling, this paragraph in the plea agreement makes no reference at all to 18 U.S.C. § 3553(f). In fact, the plea agreement as a whole makes only two fleeting references to 18 U.S.C. § 3553(f)'s safety valve, and those references are not made in connection with the language on which Altamirano-Quintero relies here. In the plea agreement's fourth section, in which the parties estimated the advisory guideline range that would apply to Altamirano-Quintero, if he were not subject to the statutory mandatory minimum ten-year sentence, the plea agreement notes that, if Altamirano-Quintero "is otherwise eligible, the Government would stipulate to a . . . 2-level 'safety-valve' reduction" in his offense level available under the guidelines. Later in that same fourth section, the plea agreement notes that, "because the offense of conviction in this case involve[s] 500 grams or more of a mixture and substance containing methamphetamine, the mandatory minimum sentence of 120 months is applicable to this defendant unless the defendant is eligible for the 'safety valve' reduction set forth above." Those are the only references in the plea agreement to § 3553(f), and they do not suggest that the Government was conceding that Altamirano-Quintero had already satisfied the safety valve's requirement that he

"truthfully provide[ ] to the Government all information and evidence [he] has concerning" his offense. 18 U.S.C. § 3553(f)(5); *cf. United States v. Reyes Pena*, 216 F.3d 1204, 1211-12 (10th Cir. 2000) (rejecting argument that Government had promised not to seek the application of a specific enhancement to the defendant's offense level where the plea agreement never mentioned that specific enhancement); *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997) (noting that the Government's obligations under plea agreement "do not issue from mere silence"); *Cunningham v. Diesslin*, 92 F.3d 1054, 1059 (10th Cir. 1996) (rejecting defendant's argument that the plea agreement entitled him to mandatory parole because "application of mandatory parole to [his] sentence is neither an explicit nor an implicit part of the plea offer").

Second, the language in the plea agreement on which Altamirano-Quintero relies is standard language prescribed by the local rule. *See* D.C.COLO.LCrR 11.1(C) and App. J. Of course, including this language in the plea agreement binds the parties to that agreement. But relying on the express language of the agreement, *see Rodriguez-Delma*, 456 F.3d at 1250-51, we cannot conclude that the Government, by using this standard language, meant to concede in every case that the defendant has satisfied the safety valve's § 3553(f)(5)'s disclosure requirement.

Nor can we conclude that Altamirano-Quintero could have "reasonably understood" the plea agreement to include such a government concession. Instead, the

plea agreement clearly contemplates that there would be additional information that the court would consider at sentencing:

> With the exception of the stipulated facts set forth above, this statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts or evidence which a party believes is relevant to sentencing. Further, the Court is not bound by the factual stipulations of the parties. In determining the factual basis for the sentence, the Court may consider not only the stipulations of the parties, but also the results of any pre-sentencing investigation that may be conducted by the U.S. Probation Department, together with any other relevant information that may be brought to the Court's attention.

This language, then, in no way establishes that the parties believed that Altamirano-Quintero had already fully disclosed *all* of the information he had for § 3553(f) purposes.

For these reasons, we conclude that the language contained in the plea agreement's fifth section does not amount to a Government concession that Altamirano-Quintero had already complied with 18 U.S.C. § 3553(f) at the time he pled guilty. Nor could Altamirano-Quintero, at the time he entered into the agreement, have reasonably understood this language to mean that he had already met § 3553(f)(5)'s requirements. Therefore, Altamirano-Quintero's interpretation of the plea agreement, as he asserts it now

on appeal, is not reasonable. *See Prince,* 204 F.3d at 1023 (rejecting defendant's interpretation because it was not reasonable); *cf. United States v. Brye,* 146 F.3d 1207, 1211 (10th Cir. 1998) (declining to give plea agreement "nonsensical" interpretation).

C. Whether the district court clearly erred in finding that Altamirano-Quintero was not eligible for safety-valve relief because he had not disclosed to the Government all of the information he had concerning his offense.

Lastly, Altamirano-Quintero asserts that the district court's finding that he did not qualify for § 3553(f)'s safety valve was clearly erroneous. The district court found that Altamirano-Quintero did not qualify because he had not truthfully disclosed all the information he had concerning his offense.

This court reviews the district court's determination of a defendant's eligibility for the safety valve for clear error. *See Stephenson,* 452 F.3d at 1180; *see also United States v. Payton,* 405 F.3d 1168, 1170-71 (10th Cir. 2005) (noting this remains the standard even after *Booker,* 543 U.S. 220). The specific question posed by § 3553(f)(5), whether or not a defendant has provided the Government with truthful and complete information, is also a factual determination reviewed for clear error. *See Gama-Bastidas,* 142 F.3d at 1241-43. In conducting this clear-error review, "we are cognizant that the district court's application of the safety valve is fact specific and dependent on

credibility determinations that cannot be replicated with the same accuracy on appeal." *Stephenson,* 452 F.3d at 1180 (quotation, alteration omitted). It was Altamirano-Quintero's burden to prove, by a preponderance of the evidence, that he did truthfully provide the Government with all the information he had.[12] *See id.* at 1179.

At sentencing, the district court had before it the facts to which the parties stipulated in the plea agreement. Altamirano-Quintero argues that, because there is no indication that those facts are untruthful, they are sufficient to satisfy his burden under § 3553(f)(5). A defendant's disclosure, however, "must not merely be truthful but also complete." *Stephenson,* 452 F.3d at 1180 (quotation omitted).

Here, there are obvious informational gaps in the facts Altamirano-Quintero admitted when he pled guilty. Altamirano-Quintero admitted that he had "670.2 grams of a mixture" containing methamphetamine in his car, which he had driven from California to Denver with a co-defendant. But Altamirano-Quintero does not indicate how or where he got the methamphetamine, or what he intended to do with it. *See Montanez,* 82 F.3d at 523 (affirming district court's finding that the defendant was not

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[12] For this reason, Altamirano-Quintero's argument on appeal that *the Government* has not shown what information he failed to disclose is unavailing. *See United States v. Salazar-Samaniega,* 361 F.3d 1271, 1276-77 (10th Cir. 2004) (rejecting this same argument).

eligible for safety-valve relief on the basis of a similar gap in information).

More to the point, this court, on several previous occasions, has held that where, as here, a defendant pleads guilty to conspiring with his co-defendant "and with other persons, known and unknown to the Grand Jury," the defendant does not comply with § 3553(f)(5) without identifying the other participants in the conspiracy, or at least explaining why he is unable to identify those other participants. *See Stephenson,* 452 F.3d at 1180-81 (holding that, "[w]hen the offense involves conspiracy or a jointly undertaken criminal venture, we require the defendant to disclose not only everything he knows about his own actions, but also everything he knows about his co-conspirators"); *Virgen-Chavarin,* 350 F.3d at 1130 (same); *Acosta-Olivas,* 71 F.3d at 377-78 (same).

In this case, Altamirano-Quintero has never identified any of the other participants in the charged drug conspiracy. Nor does he explain why he could not do so. *See Stephenson,* 452 F.3d at 1180-81 (upholding denial of safety-valve relief where it appeared "highly unlikely" that the defendant "did not know the identities of those individuals who were involved in assisting" him and his named co-defendant as part of a drug trafficking conspiracy).

In addition, in this case, Altamirano-Quintero indicated in the plea agreement that he intended to cooperate with the Government and to provide "substantial assistance." This further suggests that

Altamirano-Quintero had additional information to disclose and bolsters the record's already sufficient suggestion that he has failed to disclose all the information he had. For these reasons, the record before the district court was sufficient to support the district court's finding that Altamirano-Quintero had failed to prove by a preponderance of the evidence that he had made a complete and truthful disclosure to the Government of all the information he had concerning his offense.[13] That factual finding, therefore, was not clearly erroneous. *See Virgen-Chavarin,* 350 F.3d at 1130.

III. CONCLUSION

For the foregoing reasons, this court AFFIRMS Altamirano-Quintero's statutory mandatory minimum ten-year sentence.

HOLMES, J., concurring.

I agree with the majority that the district court did not clearly err in finding Mr. Altamirano-Quintero ineligible for safety valve relief. More specifically, I agree with the majority's reasoning in Sections II(A)

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[13] The information Altamirano-Quintero failed to disclose, then, concerns *his* "offense or offenses that were part of the same course of conduct or of a common scheme or plan," 18 U.S.C. § 3553(f)(5), as the statute requires. Therefore, Altamirano-Quintero's argument on appeal that the district court was instead requiring him to disclose information concerning other people's crimes is unavailing.

and II(C) and concur in the judgment. I am, however, troubled by Section II(B) of the majority opinion. There, the majority addresses whether Mr. Altamirano-Quintero could reasonably have understood, from the Plea Agreement's express terms, that the government conceded that he had "already complied with § 3553(f)(5)'s requirement that he truthfully disclose all the information he had regarding his offense." Maj. Op. at 11. I respectfully disagree with the majority's reasoning in Section II(B) and, therefore, cannot fully join its opinion.

In particular, I write separately for two reasons. First, to properly resolve this case, I find it unnecessary to reach the issue addressed in Section II(B). Second, the majority's tortuous efforts to overcome Mr. Altamirano-Quintero's reasonable arguments in favor of a government concession are not only unpersuasive, but also impose an unacceptable cost. Specifically, they run counter to, and undermine, our settled precedent concerning the interpretation of both the Sentencing Guidelines and plea agreements. Regarding the latter, the majority repeatedly employs a rigid, formalistic approach and declines to construe any ambiguities in the instant Plea Agreement against the drafter – the government.[1]

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[1] *See, e.g., United States v. Werner*, 317 F.3d 1168, 1170 (10th Cir. 2003) (construing plea agreement ambiguities against the government, as drafter); *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997) ("We will not allow the government to resort to a rigidly literal construction of the

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The safety valve provision (18 U.S.C. § 3553(f)) expressly requires a district court to independently determine whether a defendant has satisfied the conditions for granting safety valve relief, after affording the government "the opportunity to make a recommendation." *E.g., United States v. Gambino*, 106 F.3d 1105, 1110 (2d Cir. 1997) ("The plain language of the statute required the district court to make its own determination whether [the defendant] satisfied the safety valve provision, in light of the entire record including the government's recommendation."). Therefore, even if the government conceded that Mr. Altamirano-Quintero had satisfied the safety valve disclosure requirement, that concession would not compel the conclusion that Mr. Altamirano-Quintero had done so.

The district court was free to disregard the government's concession in favor of other evidence bearing on the subject. And, as the majority cogently demonstrates in Section II(C), the district court understood its independent role and did not clearly err in finding on the record that Mr. Altamirano-Quintero failed to satisfy the safety valve disclosure provision. Accordingly, as an initial matter, I find the majority's discussion in Section II(B) to be completely unnecessary to properly resolve this case. Even

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language of the plea agreement to frustrate a defendant's reasonable expectations." (internal quotation marks omitted) (quoting *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989))).

assuming *arguendo* the government's concession, I would reach the same conclusion regarding the unavailability of safety valve relief.

In addition, although I need not definitively opine on whether the government conceded through its relevant conduct stipulation that Mr. Altamirano-Quintero satisfied the safety valve's disclosure requirement,[2] a strong argument can be made that the government did so – more specifically, that Mr. Altamirano-Quintero reasonably could have understood the government to have made such a concession in the Plea Agreement. The majority's analysis to the contrary is unpersuasive and legally flawed. It fails to consistently adhere to the Guideline-defined meaning of "relevant conduct" and subjects the Plea Agreement to an impermissibly strained interpretation.

First, the majority observes that the government's relevant conduct stipulation "directly concern[ed] the 'relevant conduct on which the

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[2] The Plea Agreement provides in pertinent part:

> The parties believe that the sentencing range resulting from the plea agreement is appropriate because *all relevant conduct is disclosed;* that the stipulated facts by the parties take into account all pertinent sentencing factors with respect to this defendant; and that the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior.

R., Vol. I, Doc. No. 139, at 9-10 (Plea Agreement and Stipulation of Facts Relevant to Sentencing, filed June 20, 2005) (emphasis added).

sentencing *guidelines* calculate an advisory sentencing range" and did nothing more than "set[ ] the parameters for the criminal activity" about which Mr. Altamirano-Quintero was later required to provide information if he hoped to obtain safety valve relief. Maj. Op. at 14, 17. Accordingly, the majority reasons that Mr. Altamirano-Quintero could not have reasonably understood the government to have conceded that he had already provided the requisite information. *Id.* at 17. This analysis rests on the faulty assumption that the term "relevant conduct" means something different when calculating an advisory Guideline sentence than it does when determining whether a defendant is entitled to safety valve relief. The plain language of the Guidelines undercuts the majority's tacit assumption, and, therefore, weakens its rationale.

"Relevant conduct" is a term of art in criminal sentencing. As the majority recognizes, "relevant conduct" embraces the "Factors that Determine the Guideline Range." U.S.S.G. § 1B1.3(a)(1)(B). Accordingly "relevant conduct" informs the district court's determinations of "(i) the base offense level . . . , (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, ..." *Id.* The majority further acknowledges that to satisfy the safety valve's disclosure provision, a defendant must provide the government with complete information concerning the "offense of conviction and *all relevant conduct*" as defined by U.S.S.G. § 1B1.3(a)(1)(B). *United States v. Stephenson,* 452

F.3d 1173, 1180 (10th Cir. 2006) (internal quotation marks omitted and emphasis added) (quoting U.S.S.G. § 5C1.2, cmt. n. 3 (2003)); *see also United States v. Acosta-Olivas,* 71 F.3d 375, 378 (10th Cir. 1995). Notwithstanding its recognition that "relevant conduct" is applicable in both formulating an advisory sentencing range *and* ascertaining the availability of safety valve relief, the majority nonetheless fails to accord the term "relevant conduct" the same meaning in both contexts.

"We interpret the Sentencing Guidelines according to accepted rules of statutory construction." *United States v. Reaves,* 253 F.3d 1201, 1203 (10th Cir. 2001). "In interpreting a guideline, we look at the language of the guideline itself, as well as at the 'interpretive and explanatory commentary to the guideline' provided by the Sentencing Commission." *United States v. Robertson,* 350 F.3d 1109, 1112 (10th Cir. 2003) (quoting *United States v. Frazier,* 53 F.3d 1105, 1112 (10th Cir. 1995)). The term "relevant conduct" is expressly defined by the Guidelines. Therefore, we typically apply the same meaning to the term each time it appears in the statute. *Sierra Club v. Seaboard Farms Inc.,* 387 F.3d 1167, 1175 (10th Cir. 2004) (when a technical term is used in a statute, "it is presumed . . . that the term [has] the same meaning in each of the sections or subsections"); *see also United States v. Perez,* 366 F.3d 1178, 1182 (11th Cir. 2004) ("Where the same language appears in two guidelines, it is generally presumed that the language bears the same meaning in both."). *Cf.*

Watson v. United States, ___ S. Ct. ___, 2007 WL 4292111 at ** 3-5 (Dec. 10, 2007) (rejecting a uniform application of the term "use," which was undefined by the statute and not a term of art).

Because "relevant conduct" means the same throughout the Guidelines, the majority's attempt to limit the scope of the government's chosen language solely to the calculation of the advisory sentencing range is unpersuasive. "Relevant conduct" means the same for calculation of the advisory sentencing range as it does for application of the safety valve. Consequently, we could reasonably construe the government's express acknowledgment that Mr. Altamirano-Quintero disclosed all "relevant conduct" for one Guidelines purpose as an acknowledgment that he disclosed it for all Guidelines purposes.

In addition, I question the majority's reading of the Plea Agreement itself. The majority concludes for two principal reasons that Mr. Altamirano-Quintero could not reasonably interpret the Plea Agreement as stipulating that he had already provided the government with all of the information necessary to obtain safety valve relief: first, because the Plea Agreement refers only fleetingly to 18 U.S.C. § 3553(f);[3] and

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[3] Identifying several passages in the Plea Agreement, the majority asserts, "they do not suggest that the Government was conceding that Altamirano-Quintero had already satisfied the safety-valve's requirement that he 'truthfully provide[ ] to the Government all information and evidence [he] has concerning the offense." Maj. Op. at 18 (quoting 18 U.S.C. § 3553(f)(5)). I

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second, because it contemplates that the court would consider additional information at sentencing. I am not convinced by either argument.

Relying on *United States v. Reyes Pena,* 216 F.3d 1204, 1212 (10th Cir. 2000), *United States v. Rockwell Int'l Corp.,* 124 F.3d 1194, 1199 (10th Cir. 1997), and *Cunningham v. Diesslin,* 92 F.3d 1054, 1059 (10th Cir. 1996), the majority concludes that because the Plea Agreement language at issue does not expressly state that Mr. Altamirano-Quintero complied with § 3553(f), or even refer to the provision, the government did not concede that he disclosed all of the necessary information to meet the disclosure requirement. The cited cases, however, are inapposite.

In each of them, the defendant was attempting to introduce a new term into a plea agreement. Here, the Plea Agreement already includes the term in question – the relevant conduct stipulation. The inquiry relates to what that term means. That the "relevant conduct" language does not explicitly refer to § 3553(f) renders its scope, at most, ambiguous. Such ambiguities are "construe[d] . . . against the

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find a less labored interpretation of the language at issue more persuasive. The government's relevant conduct language, when read in conjunction with the two provisions identified by the majority, could reasonably convey that although Mr. Altamirano-Quintero had revealed sufficient information to satisfy § 3553(f)(5), the government was noncommittal as to whether he had satisfied *all* of the elements necessary to obtain safety valve relief.

government as the drafter of the agreement," *United States v. Werner*, 317 F.3d 1168, 1170 (10th Cir. 2003).[4]

Furthermore, simply because the Plea Agreement allows the parties to present additional facts or evidence at sentencing[5] would not necessarily prevent

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[4] The majority refers to the relevant conduct stipulation as "standard language prescribed by the local rule." Maj. Op. at 19. Although the majority acknowledges, as it must, that such generic language has the power to "bind[ ] the parties to that agreement," it states that it "cannot conclude that the Government, by using this standard language, meant to concede in every case that the defendant has satisfied the safety valve's § 3553(f)(5)'s disclosure requirement." *Id.* However, whether the government actually meant to concede that general proposition is not the point. Rather, at issue is what Mr. Altamirano-Quintero reasonably could have concluded the government was giving him through the relevant conduct stipulation. We have acknowledged that "the rules of contract law inform the interpretation and enforcement of promises in a plea agreement." *United States v. Novosel*, 481 F.3d 1288, 1291 (10th Cir. 2007) (internal quotation marks and brackets omitted) (quoting *Rockwell Int'l Corp.*, 124 F.3d at 1199). Thus, we must rely on the express language of the agreement to discern the parties' intent. *United States v. Brye*, 146 F.3d 1207, 1210 (10th Cir. 1998).

[5] The Plea Agreement provides:

> With the exception of the stipulated facts set forth above, this statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts or evidence which a party believes is relevant to sentencing. Further, the Court is not bound by the factual stipulations of the parties. In determining the factual basis for the sentence, the Court may consider not only the stipulations of the parties, but also the results of any pre-sentencing investigation that may be conducted by

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Mr. Altamirano-Quintero from reasonably believing that the government had conceded that he had already disclosed all "relevant conduct" for safety valve purposes. Relevant conduct does not constitute the entire universe of information that courts properly may consider in imposing sentence. The Plea Agreement merely recognizes that truth.

Absent some restriction in the Guidelines or other law, the sentencing court is free to "consider, without limitation, any information concerning the background, character and conduct of the defendant." U.S.S.G. § 1B1.4. Consequently, the Plea Agreement could reasonably be read to allow the parties to provide additional information for the court's consideration, without its language eroding the foundation for Mr. Altamirano-Quintero's arguably reasonable belief that the government had conceded that he already had provided all of the information necessary to satisfy the safety valve's disclosure provision (i.e., information concerning his relevant conduct).[6]

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the U.S. Probation Department, together with any other relevant information that may be brought to the Court's attention.

R., Vol. I, Doc. No. 139 at 6.

[6] Indeed, as the majority correctly recognizes, the informational requirements of the safety valve provision and the substantial assistance provision are not coterminous. Accordingly, if Mr. Altamirano-Quintero had in fact followed the path anticipated by the Plea Agreement and sought substantial assistance relief, he could quite conceivably have provided the government (and, derivatively, the court) with additional

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In sum, I disagree with the majority's decision to reach the issue discussed in Section II(B), relating to the government's alleged plea agreement concession. It is a step unnecessary to the proper resolution of this case. Moreover, the majority's decision to take this step will be costly; its strained analysis contravenes our circuit's settled principles for interpreting both the Guidelines and plea agreements. Accordingly, although concurring in the result, I cannot fully join the majority's opinion.

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information concerning the illegal activities of others that would not have fallen within the scope of the relevant conduct of his offense (i.e., outside of the universe of information that he was required to disclose to obtain safety valve relief).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS ALTAMIRANO-QUINTERO, Defendant-Appellant.	No. 06-1254 (D.C. No. 04-cr-00188-REB)

JUDGMENT

Filed December 28, 2007

Before **TYMKOVICH**, **EBEL**, and **HOLMES**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

If defendant, Luis Altamirano-Quintero, was released pending appeal, the court orders that, within 30 days of this court's mandate being filed in District Court, the defendant shall surrender to the United-States Marshal for the District of Colorado. The District Court may, however, in its discretion, permit

the defendant to surrender directly to a designated Bureau of Prisons institution for service of sentence.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 04-CR-188 RB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. ISRAEL SILVA-PALACIOS, and
2. LUIS ALTAMIRANO-QUINTERO,

Defendants.

INDICTMENT

21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 18 U.S.C. § 2

(Filed May 3, 2004)

The Grand Jury Charges that:

COUNT ONE

From on or about April 20, 2004, the exact date being unknown to the Grand Jury, through April 22, 2004, within the State and District of Colorado, the State of California, and elsewhere, defendants,

ISRAEL SILVA-PALACIOS, and
LUIS ALTAMIRANO-QUINTERO,

did knowingly and intentionally combine, conspire, confederate, and agree with each other and with other persons, known and unknown to the Grand Jury, to possess with intent to distribute a quantity of

500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812, and the regulations enacted thereunder, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

On or about April 22, 2004, within the State and District of Colorado, defendants,

ISRAEL SILVA-PALACIOS, and
LUIS ALTAMIRANO-QUINTERO,

did knowingly and intentionally possess with intent to distribute a quantity of 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812, and the regulations enacted thereunder, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), or did aid and abet the same in violation of Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ [Illegible]
GRAND JURY FOREPERSON

APPROVED:

JOHN W. SUTHERS
UNITED STATES ATTORNEY

By: /s/ JAMES R. BOMA
JAMES R. BOMA
ASSISTANT UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 04-CR-188-RB

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. LUIS ALTAMIRANO-QUINTERO,

Defendant.

PLEA AGREEMENT AND STIPULATION OF FACTS RELEVANT TO SENTENCING

THE UNITED STATES OF AMERICA, by and through its undersigned. Assistant U.S. Attorney for the District of Colorado, hereinafter referred to as the Government, and the defendant, Luis Altamirano-Quintero, hereinafter referred to as the defendant, personally, and by and through his counsel of record, Harvey A. Steinberg, Esquire, submit the following Plea Agreement and Stipulation of Facts relevant to sentencing, pursuant to the provisions of pursuant to D.C.COLO.LCrR11.1:

I. PLEA AGREEMENT

A. The defendant agrees to plead guilty to Count One of the Indictment returned against him in this matter. At the conclusion of a sentencing hearing in which the Court accepts this Plea Agreement of the parties,

the Government agrees that it will dismiss with prejudice Count Two of the Indictment.

B. Count One charges a conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. The elements of this offense that the Government must prove beyond a reasonable doubt at trial, in addition to establishing venue in the State and District of Colorado by a preponderance of the evidence, are as follows:

(1) That two or more persons conspired or agreed to possess with intent to distribute methamphetamine;

(2) That the defendant knew at least the essential objectives of the conspiracy;

(3) That the defendant knowingly and voluntarily became a part of it; and

(4) That the alleged coconspirators were interdependent.

C. The parties jointly acknowledge that the defendant has expressed the intent to cooperate with the Office of the United States Attorney for the District of Colorado by providing testimony, documents, and other information known to the defendant about the criminal wrongdoing of other persons. The defendant agrees that he shall cooperate fully with the Government by:

(1) providing ***truthful and complete*** information and testimony when called upon by the Office of the United States Attorney for the District of Colorado; and

(2) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings as may be required by the Office of the United States Attorney for the District of Colorado.

D. The Government reserves the sole right to evaluate the nature and extent of the defendant's cooperation and to make the defendant's cooperation, or lack thereof, known to the Court at the time of sentencing. At this time, this defendant has not yet been debriefed. However, the parties stipulate that the defendant will submit to a proffer or interview by agents between the dates of the change of plea and sentencing hearings pursuant to a proffer letter agreement which is attached hereto and incorporated herein by reference as **Exhibit A to this Agreement**. Assuming a truthful and complete debriefing that is deemed to be of substantial assistance to the Government and assuming the continuing complete and truthful cooperation of this defendant consistent with that proffer, the Government anticipates filing a motion pursuant to §5K1.1 of the Sentencing Guidelines and 18 U.S.C. §3553(e), reflecting that the defendant has provided substantial assistance as set forth herein below and to recommend a downward departure of

approximately 24 months off the lowest end of the otherwise applicable Sentencing Guidelines range. However, if such a motion is made, the defendant understands and agrees that the Court is under no obligation to grant the Government's motion.

E. As set forth above, the Government agrees with the defendant's request to the Court to be sentenced at the lowest end of the applicable Guidelines range, but reserves full rights to object to the setting of the applicable Guidelines range if the Government is of the opinion that an error has been made by the Probation Department. Finally, the defendant understands and agrees that the Court may impose any sentence authorized by law and the defendant may not withdraw his guilty plea solely as a result of the sentence imposed.

F. This plea agreement is submitted pursuant to the provisions of Rule 11(c)(1)(B), Fed.R.Crim.P.

II. STATUTORY PENALTIES

A. The maximum statutory penalty for the offense charged in Count One of the Indictment is a term of imprisonment which shall be not less than 10 years, nor more than life imprisonment; a fine of up to $4,000,000, or both; a term of supervised release of at least five years; and a mandatory special assessment of $100.

B. The conviction may cause a loss of civil rights, including, but not limited to, the right to possess firearms, to vote, to hold elected office, and to sit on a jury. Further, because this defendant is not a citizen of the United States, this defendant will be deported to the Republic of Mexico following the completion of his sentence in this matter.

C. A violation of the conditions of probation or supervised release may result in a separate prison sentence.

III. STIPULATION OF RELEVANT FACTS

A. The parties stipulate and agree that the Government's evidence at trial would establish the following:

(1) On April 22, 2004, detectives of the Denver Police Departments' Narcotics Interdiction Unit (NIU) and Special Agents of the Drug Enforcement Administration (DEA) were conducting routine checks of various local motels in the Denver area looking for various indicators of possible narcotics activity. Detectives were at the Days Inn Motel at 620 Federal Boulevard, Denver. Colorado when Detective Romero observed a green-colored Nissan Altima vehicle with California license plates drive through the middle parking lot area and circle as if the occupants were looking for someone or something. Two males, later identified as this defendant and co-defendant Israel Silva-Palacios, hereinafter "Silva," were inside this vehicle at the time.

(2) Detective Romero followed the vehicle to the front lobby area of the motel and observed the driver, this defendant, exit the vehicle and enter the front lobby. Detective Romero also entered the lobby and observed the driver paying with cash for Room Number 150 for one night. This defendant appeared to have a large amount of U.S. currency. Detective Romero obtained the driver's name from the copy of the driver's license he left on the counter when he exited the lobby. Detective Romero ran a computer check with negative results on that individual, this defendant.

(3) The two men in the vehicle then drove away from the lobby, parked and both men entered Room Number 150. Detective Overton ran a check on the vehicle's license plate number and found that it was registered to this defendant. After the two men entered the room, they did not exit and no other individuals arrived at or departed from the room.

(4) At about 11:30 a.m. on the same date, the detectives decided to contact the occupants of Room Number 150. Detective Romero knocked on the door and this defendant responded by opening the door. Detective Romero advised that the detectives were with the NUI and showed his identification. He asked this defendant for permission to come in and talk and this defendant gave permission. Detective Romero entered the room and again advised the two occupants of the room,

this defendant and co-defendant Silva, that they were officers from NUI.

(5) Detective Romero asked the men if they had just driven in from California and they said they had. Detective Romero asked why they had obtained the room for only one night and they stated that they were only staying one night. They stated they were in Denver to buy a car and were going back to California the next day. Detective Romero asked if they had any controlled substances on them, in their room or in their vehicle and they each responded "No." Detective Romero asked for permission to search the room and vehicle and both men consented. The detectives searched the room and found nothing but this defendant told them he had $1000.00 in his pocket. Detective Romero asked for permission to search the vehicle and this defendant said they could. He gave them the keys and Detectives Romero and Sanchez went out to the car.

(6) The detectives then searched the vehicle and recovered what appeared to be methamphetamine from the front console area of the vehicle. Detective Romero advised this defendant of his Constitutional warnings and asked if he wanted to cooperate by giving up the name of the person to whom they were supposed to deliver the drugs. He declined, but did state that "What we did was wrong.", or words to that effect. Detective Sanchez asked: "Who put the stuff in the car?," and this defendant said that "We did." This

defendant initially indicated that he wanted to cooperate with the detectives, but he then changed his mind. The interview was terminated at that point. Following advisement, defendant Silva said nothing to the detectives.

(7) Subsequent forensic analysis by Forensic Chemist Charles H. Butler of the DPD Crime laboratory, confirmed that the drugs recovered (3 plastic bags, in turn, containing 4 plastic bags, collectively referred to as Government Exhibit 2) were, in fact, methamphetamine with the following quantitative and qualitative analysis:

(A) Exhibit 2A: 282.7 grams of methamphetamine (39% purity);

(B) Exhibit 2B: 2 plastic bags containing 67.212 grams (56% purity) and 89.488 grams (98% purity); and

(C) Exhibit 2C: 230.8 grams (60% purity).

(8) Thus, the total drug quantity is 670.2 grams of a mixture and substance of methamphetamine that, in turn, contains 374.07 grams of methamphetamine (actual), yielding an offense level of 34 under §2D1.1(c)(3) of the Sentencing Guidelines.

B. With the exception of the stipulated facts set forth above, this statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts or evidence which a party believes is relevant to sentencing. Further, the Court is

not bound by the factual stipulations of the parties. In determining the factual basis for the sentence, the Court may consider not only the stipulations of the parties, but also the results of any pre-sentencing investigation that may be conducted by the U.S. Probation Department, together with any other relevant information that may be brought to the Court's attention. *See* §1B1.4, *U.S.S.G.*

IV. SENTENCING COMPUTATION

A. The parties stipulate and agree that the defendant's sentence will be imposed by the Court pursuant to the provisions of Title 18, United States Code, Section 3553, as guided by the *Federal Sentencing Guidelines and Policy Statements,* promulgated pursuant to Title 28, United States Code, Section 994(1). However, the defendant understands and agrees that the Sentencing Guidelines are advisory in nature and not binding upon the Court. The defendant is also aware that a sentence imposed under the Guidelines does not provide for parole. Knowing these facts, the defendant understands and agrees that this Court has jurisdiction and authority to impose any sentence within the statutory maximum set for his offense. Again, the defendant understands and agrees that he may not withdraw his plea solely as a result of the sentence imposed.

B. The defendant is also aware that any estimate of the probable sentencing range that he may receive from his counsel, the Government or the Probation Department, is a prediction, not a promise, and is not binding upon the Government, the Probation Department or the Court.

C. The following factors, stipulated to by the parties, are deemed to be relevant to the sentencing of this defendant under the Guidelines and are intended to advise the Court and the Probation Department of the parties' predictions in advance of the preparation of the pre-sentencing investigation report (PSI), as set forth under §6B1.4 of the Guidelines:

(1) The parties stipulate that the base offense level for Count One of the Indictment is **34** under §2D1.1 of the Sentencing Guidelines.

(2) The parties stipulate that there are no specific offense characteristics.

(3) The Government agrees that it will not seek a victim-related nor an obstruction adjustment.

(4) The parties stipulate that this defendant should receive no aggravating nor mitigating role in the offense reduction under §§ 3B1.1 or 3B1.2 of the Sentencing Guidelines.

(5) The parties stipulate that there should be no career offender nor career livelihood adjustments.

(6) The Government joins in the defendant's request that he receive the 3-level acceptance of responsibility decrease under §3E1.1(a) and (b) of the Sentencing Guidelines. If granted by the Court, the adjusted offense level would be **31**.

(7) The Government states that if this defendant is otherwise eligible, the Government would stipulate to a further 2-level "safety-valve" reduction under the provisions of §2D1.1(b)(6). If this defendant is eligible and the Court grants this reduction, the adjusted offense level would be **29**.

(8) The parties estimate that based upon a review of the defendant's previous arrest and conviction records, he will have not more than 1 criminal history point and will thus fall into Criminal History Category I. The parties understand and agree that this estimate regarding the defendant's Criminal history category is a projection, and that the final criminal history category will be determined by the Court following a review of the presentencing investigation report. Finally, the defendant understands and agrees that this Plea Agreement is not conditioned upon the defendant being in a particular criminal history category.

GUIDELINES PREDICTION

D. The Guidelines' sentencing range for the count of conviction, resulting from an offense level of 29, Criminal History Category I, is a term of imprisonment of 87-108 months. For the information of the defendant, the sentencing range for offense level 29, Criminal History categories I-VI, is 87-188 months, respectively. However, because the offense of conviction in this case involve 500 grams or more of a mixture and substance containing methamphetamine, the mandatory minimum sentence of 120 months is applicable to this defendant unless the defendant is eligible for the "safety valve" reduction as set forth above or the Government files and the Court grants the referenced motion for sentencing reduction subject to the conditions set forth above.

E. As set forth above, assuming a complete and truthful proffer pursuant to the attached proffer letter agreement (Exhibit A to this Agreement) that is deemed to be of substantial assistance to the Government, and assuming the continuing truthful and complete cooperation of this defendant including testimony, if he is called by the Government, the Government will file a motion for sentencing reduction, recommending 24 months off the lowest end of the applicable Sentencing Guidelines range, estimated at 87 months, resulting in an estimated sentencing recommendation of 63 months in this case.

F. Pursuant to §5E1.2 of the Sentencing Guidelines, the range of fines for offense level 29 for the offense of conviction is $15,000 to $4,000,000, respectively.

G. In addition, the defendant is subject to the imposition of a term of supervised release of not less than 5 years and a mandatory special assessment of $100.

V. WHY THE PROPOSED PLEA DISPOSITION IS APPROPRIATE

A. The parties believe that the sentencing range resulting from the proposed plea agreement is appropriate because all relevant conduct is disclosed; that the stipulated facts by the parties take into account all pertinent sentencing factors with respect to this defendant; and that the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior.

B. This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings or assurances, express or implied. In entering this agreement, neither the United States nor the defendant have relied, or are relying, on any terms, promises, conditions or assurances not expressly stated in this agreement.

Respectfully submitted,

Date:6/20/05 By: /s/ Luis Altamirano
LUIS ALTAMIRANO-QUINTERO
DEFENDANT

Date:6/20/05 By: /s/ Harvey A. Steinberg
HARVEY A. STEINBERG, ESQUIRE
ATTORNEY FOR DEFENDANT ALTAMIRANO

Date:18June2005 By: /s/ James R. Boma
JAMES R. BOMA
ASSISTANT UNITED STATES ATTORNEY

EXHIBIT A
TO LUIS ALTAMIRANO-QUINTERO
PLEA AGREEMENT

U.S. Department of Justice
William J. Leone

[SEAL]

United States Attorney
District of Colorado
Drug Task Force

[Address Omitted In Printing]

June 18, 2005

Harvey A. Steinberg, Esq.
1600 Broadway, Suite 1200
Denver, Colorado 80202

Re: *United States v. Luis Altamirano-Quintero*
Case Number: 04-CR-188-RB
District of Colorado
Proffer Letter Agreement

Dear Mr. Steinberg:

Based upon your statements yesterday afternoon in Court, it is my understanding that your client, LUIS ALTAMIRANO-QUINTERO, hereinafter referred to as the "client" or "defendant," may wish to enter into a substantial assistance/cooperation plea agreement with the United States regarding the above-referenced case.

Such cooperation should initially involve a meeting between agents and your client so that your client can make a proffer to be evaluated by the Government.

In order to assure that there are no misunderstandings concerning the procedures to be followed in making such a proffer, I am writing to clarify the ground rules.

1. No oral or written statements given during the proffer will be used against the defendant in the Government's case in chief or form the basis of subsequent prosecution, **with the exception of statements relating to acts of violence, or untruthful statements made during the proffer.**

2. The Government may make derivative use of and may pursue any investigative leads suggested by statements or other information provided by your client during the proffer, and may use any evidence so developed against your client and other persons in the event that your client proceeds to trial. This will eliminate the need for a *Kastigar* hearing.

3. Your client must provide a ***truthful*** and complete summary of all facts of which he has knowledge relating to this case. If your client testifies at any proceeding, including, but not limited to, a trial, and if he offers testimony different from the statements made in the proffer, the Government may cross-examine him about the statements made in the proffer and may introduce in evidence the contents of those statements as impeachment or rebuttal evidence.

4. If, following the proffer, your client elects to proceed to trial and is convicted, the Government agrees that, pursuant to §1B1.8(a)

of the Guidelines, self-incriminating information provided under this agreement will not be used against your client, except as provided under §1B1.8(b) of the Guidelines and paragraph 3 of this agreement.

5. Should it be determined by the United States Attorney's Office for the District of Colorado that any information or testimony provided by your client is materially and willfully false, he may be subject to prosecution for any appropriate federal criminal violations which he may have committed, including, but not limited to, perjury, making a false statement, and obstruction of justice. Further, any materially false statements, information, or testimony which your client may provide would be used against him in a subsequent prosecution.

6. The Government would be interested in your client's knowledge relating to federal level of interest offenses involving narcotics, specifically with *detailed* information relating to persons and organizations which were involved in the activities set forth in the complaint in this case, and other similar activities of which your client has firsthand knowledge.

7. The Government will require that your client freely and actively disclose information relating to assets owned or effectively controlled by himself or others involved in this offense. Should the Government decide that your client is not being candid with respect to assets owned or effectively controlled by himself or

others, this agreement shall be null and void as to any obligations on the part of the United States.

8. **With the exception of the undersigned Assistant United States Attorney, no other officer or agent has any authority, express or implied, to offer any concessions or to make any promises which are binding upon the United States of America.**

9. Finally, you should understand that the Government reserves to its ***sole discretion*** the right to decide whether or not your client has rendered substantial assistance and is, therefore, entitled to sentencing consideration.

10. No additional promises, agreements and conditions have been entered into other than those expressly set forth in this letter, and none will be entered into unless in writing and signed by all the parties.

I trust that you will find these ground rules and this anticipated procedure fair and reasonable. If your client wishes to engage in a discussion pursuant to the guidelines outlined above, you and your client should both sign this letter in the space indicated below.

Once the letter has been signed, please return the original to me prior to or at the time of the scheduled debriefing.

Sincerely,

WILLIAM J. LEONE
ACTING UNITED STATES
ATTORNEY

/s/ James R. Boma
JAMES R. BOMA
ASSISTANT UNITED STATES
ATTORNEY

ACKNOWLEDGMENT

I, Harvey A. Steinberg, am the attorney for Luis Altamirano-Quintero. I have explained to him the terms and conditions set forth above, and have had them translated into the Spanish language for him and I am satisfied that he understands and agrees to them.

Date:6/20/05 /s/ Harvey A. Steinberg
HARVEY A. STEINBERG,
ESQUIRE
COUNSEL FOR
LUIS A. QUINTERO

I, LUIS ALTAMIRANO-QUINTERO, understand the foregoing rules, after having them explained to me in the Spanish language. I agree that I will make a proffer under the terms and conditions set forth above.

Date:6/20/05 /s/ Luis Altamirano
LUIS ALTAMIRANO-QUINTERO
DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Acton No. 04-cr-00188-REB

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS ALTAMIRANO-QUINTERO,

Defendant.

REPORTER'S TRANSCRIPT
HEARING ON SENTENCING

(Filed Jul. 25, 2006)

Proceedings before the HONORABLE ROBERT E. BLACKBURN, Judge, United States District Court for the District of Colorado, commencing at 2:40 p.m., on the 16th day of June, 2006, in Courtroom A701, Alfred A. Arraj United States Courthouse, 901 19th Street, Denver, Colorado.

APPEARANCES

JAMES BOMA, Assistant United States Attorney, 1225 Seventeenth Street, #700, Denver, Colorado, appearing for the Government.

Suzanne M. Claar, Official Reporter
901 19th St.
Denver, Colorado, 80294-3589
(303) 825-8874

[2] Boston H. Stanton, Jr., P.O. Box 200507, Denver, Colorado, appearing with the Defendant.

[3] PROCEEDINGS

(Proceedings commenced at 2:40 p.m.)

THE COURT: Good afternoon, and thank you. Please be seated.

As set this is case 04-CR-188, United States of America v. defendant No. 2, Luis Altamirano-Quintero.

The matter is before me for sentencing. The government appears by Assistant United States Attorney James Boma. Good afternoon.

MR. BOMA: Good afternoon, your Honor.

THE COURT: Defendant No. 2, Mr. Luis Altamirano-Quintero, appears in person. Good afternoon.

THE INTERPRETER: Good afternoon.

THE COURT: Together with his attorney, Boston Stanton. Good afternoon.

MR. STANTON: Good afternoon, your Honor.

THE COURT: Present and pinch hitting from the probation department is Ms. Caryl Ricca. Good afternoon.

THE PROBATION OFFICER: Good afternoon, your Honor.

THE COURT: Pursuant to 18 U.S.C. Section 3552 and Federal Rules of Criminal Procedure 32, the probation department has conducted a presentence investigation and has filed a presentence report with an addendum and a second addendum.

I have received, read and reviewed that report and addenda.

[4] Has the government, Mr. Boma?

MR. BOMA: Yes, your Honor.

THE COURT: Additions or corrections of a material or substantive nature not now of record?

MR. BOMA: No, your Honor.

THE COURT: Has the defense, to include the defendant himself, Mr. Stanton?

MR. STANTON: Yes, your Honor.

THE COURT: Additions or corrections of a material or substantive nature not now of record?

MR. STANTON: No, your Honor.

THE COURT: Thank you.

Counsel, I digress to inquire, do you stipulate that Ms. Julia Davis, who is assisting the defendant as an interpreter, has the qualifications, experience and expertise to serve the court and defendant? The government?

MR. BOMA: Yes, your Honor.

THE COURT: The defense?

MR. STANTON: Yes, your Honor.

THE COURT: Ms. Davis, in this case I make that unanimous. Please stand to be sworn in this case.

(Interpreter sworn.)

THE INTERPRETER: I do.

THE COURT: Thank you. Please resume your seat next to the defendant.

[5] Very well. Mr. Stanton, as attorney for the defendant, do you wish to make a statement on behalf of the defendant, offer information in mitigation of his punishment, comment on the probation officer's determinations and other matters affecting sentence?

MR. STANTON: Yes, your Honor.

THE COURT: Thank you.

MR. STANTON: Thank you.

And I notice that the – just to digress a little bit, the court did not address my motion that I filed this morning to withdraw, assuming the court will address that after the sentencing.

THE COURT: After sentencing, or perhaps after a Notice of Appeal is perfected, but we will take it up at the propitious time, but not now.

MR. STANTON: Thank you, your Honor.

I just wanted to make sure, your Honor, that there were no issues with that.

First of all, your Honor, I have had an opportunity to review the report with my client. He has indicated that the information contained therein is true and accurate. Of course the court has indicated I have no additions or deletions to the report.

It seems, as I have stated to the court previously, the only issues – there might be many – but the issue for my [6] client having not satisfied the requirements of the 5K1.1, substantial assistance motion of the government, would be left with whether or not he would receive the benefit of his plea agreement, in light of everything else, and I submit to the court that would be appropriate in this circumstance, that he did enter a plea agreement.

His plea agreement lays out substantial factual basis providing his truthful information given to the government, signed and attested and ratified by Mr. Boma himself as being true information, and his attorney, Mr. Harvey Steinberg, who assisted in negotiating that plea agreement on behalf of his client, Mr. Altamirano, who verified that my client was in fact providing the government with truthful information, and then verified by my client as being truthful.

Therefore, my client has in fact satisfied the safety valve requirements under 5C1.2, and of course 18 U.S.C. 3553(f)(1) through (5), and I submit to the court that if – there have been other hearings in this

court where the court has indicated, through rulings or otherwise, that my client has adopted by signs or omissions the statements and representations made by his then counsel Mr. Steinberg.

I would suggest or request that my client be afforded that same standard in the providing of truthful information for purposes of the safety valve, Judge. With that, I request the court to adopt that.

[7] Absent that, of course, there are two ways the court can go. I don't think anyone is contesting the three-level acceptance of responsibility. If the court follows that line of reasoning, then we request the court to accept the plea agreement, which is a recommendation at the bottom of the guideline range.

Mr. Boma did file a motion putting everybody on notice that my client had not debriefed subjecting himself to no substantial assistance motion by the government, and that is in fact true.

But the safety valve and the substantial assistance, those are totally two different things, your Honor, and even though he did not avail himself of substantial assistance under the 5K motion, he has availed himself of the safety valve.

We ask the court to adopt my reasoning and to sentence my client accordingly. I have nothing further. Thank you, your Honor.

THE COURT: Thank you.

Mr. Altamirano, before I impose sentence on you, you have the legal right of allocution, which includes the right and opportunity to make your own statement to this court and/or offer additional information in mitigation, lessening of your punishment.

First, do you understand that you now have this right and opportunity?

[8] THE INTERPRETER: Yes.

THE COURT: And second, having this right and opportunity in mind, do you wish to make any such statement and/offer any such information?

THE INTERPRETER: Yes.

THE COURT: Thank you.

I respectfully request and require the defendant and his attorney to report to the podium, please, and gentlemen, thank you both.

THE INTERPRETER: You want me to stand over there?

THE COURT: Yes, please.

First, Mr. Altamirano, please raise your right hand now to be sworn by the court, and thank you.

(The defendant was sworn.)

THE INTERPRETER: Yes.

THE COURT: Thank you.

Mr. Altamirano, now under oath, what is it that you would tell the court?

MR. STANTON: For the record, I have no knowledge of what is getting ready to transpire. Thank you, your Honor.

THE INTERPRETER: This is just a letter that I brought for the Judge, and I left a copy over there.

THE COURT: Very well.

THE INTERPRETER: Basically, what I just wanted to say on the record, I just wanted this to be on the record because [9] I've had – sent many letters to the Judge, and also to my attorney, and there are some things I wanted to be included in the record, and I sent a letter to the judge about a month and a half ago, and this letter is in English. I don't know if I can read it in English. I am going to try my best.

THE COURT: Very well.

MR. ALTIMIRANO: The problem lies behind the Motion to Suppress itself. This started with the issue of consent to which the court was very noticeable – to the court was very noticeable.

Basically what I am trying to say in this letter is that there was what they call ineffective assistance, and I am trying to point out the issues that were where my attorney was ineffective.

I gave this information to my attorneys, the one before Mr. Stanton, and also to Mr. Stanton, and he disagreed with what I – information, and basically he is telling me these issues have no grounds, and so I am going to continue reading this letter because through the whole motion the main and only argument mentioned is that the officers violated the defendant's, right by conducting a search that exceeded the scope of any consent given by the defendant, triggering the consent as established beyond job accomplished, your Honor, is presumably reversible, and what the court uses as fait accompli. I am sorry. I am shaking a little bit.

[10] But also because the testimony of the defendant was focused on the issue of the consent. This is while I was testifying in the hearing at Motion to Suppress the evidence, which was not mentioned in the motion. The defendant's testimony was rendered suspect, and the testimony of the officer was more credible to the court. So my own testimony worked against me. This happened because the issue of the consent was not included in the motion.

Also, I raise the issue of the recent suspicion probable cause for filing in the K-9, which issues I had been claiming in my many letters, and I could have – could have been proven.

I also believe this is the reason why the court decided that it didn't matter whether the K-9 started on the inside or outside of my car because the K-9 was not part or was not included in the motion.

In conclusion, I believe that the word he used in the Motion to Suppress hurt me more than he helped me, and the other letter you are looking into, the one page that I read, at the very end basically it just goes to the main point, so I would like both of the letters to be part of the record, you know, for my appeal.

That's all I have to say. Thank you, your Honor.

One more thing, that I am not trying to justify my action, and I apologize for my decision to the court and to the [11] United States.

THE COURT: Thank you, Mr. Altamirano, and you may be seated.

Now, the defendant has made a request that a copy of one or more items of communication be tendered to the court for filing and consideration in this matter, and perhaps in any subsequent appeal.

His request in that regard is granted.

Mr. Stanton, in aid of the defendant and the court, would you please tender to the courtroom deputy clerk the item or items of correspondence to which Mr. Altamirano referred during his allocution. Thank you.

MR. STANTON: May I make a statement? I am not going to read it because I haven't been privy to it, nor do I know what's in it. My client is not talking to me. So whatever is in this letter, it's not representation through this counsel. I would just like the record to be clear of that.

I will assist the court.

THE COURT: Duly noted. Thank you.

Now, Mr. Altamirano, do I now have what you want me to have?

THE INTERPRETER: Yes. That letter, yes.

THE COURT: Thank you.

Mr. Boma, does the government wish to be heard on matters material to the imposition of sentence?

[12] MR. BOMA: Yes, your Honor, very briefly.

THE COURT: Thank you.

MR. BOMA: Your Honor, we just note, as a matter of housekeeping, if you will, the government has previously filed a motion for third level for acceptance of responsibility, and that was filed in the pre-electronic filing era back in August of '05, so I don't have the docket entry for that.

THE COURT: Thank you.

MR. BOMA: More recently, we filed a Motion to Dismiss Count 2 and a proposed order for the court's consideration.

Your Honor, as regards this defendant, and as the court will recall, the plea agreement was entered basically the Monday morning, and about at or about eleven o'clock on what was supposed to be the first day of trial, and the jury selection was deferred to the

afternoon, and we finally reached a plea agreement in this matter that morning.

At the time the government entered into a plea agreement, we anticipated, based upon representations of counsel, that this defendant would submit to a debriefing, and the government, in light of the eleventh hour nature even incorporated a proffer letter agreement that's customarily used by at least me in drug cases for future execution of the parties because we had no opportunity to review that or execute it, so normally that would not be part of the plea agreement, but in this case it was.

[13] I would note two things. One is that the stipulation of relevant facts on page 4 under III(a), the government noted here the parties stipulate and agree that the government's evidence at trial would establish the following. So Mr. Altamirano is thereby adopting, if you will, that that's what we say that our evidence would be if the case were to proceed to trial.

We have had no opportunity to interview Mr. Altamirano-Quintero, as was anticipated on the date of the change of plea.

I agreed not to oppose or stipulated to a safety valve reduction, but one factor the government has not spoken to this defendant. We have heard him in court at the various proceedings in this matter before the court. But we have had absolutely no opportunity to speak with this defendant beyond that, so the government is unable to state unequivocally that he has satisfied 18 U.S.C. Section 3553(f)(5), and we

would defer to the court as to whether the court thinks that what the representations made by this defendant at the change of plea hearing were sufficient to satisfy that, but I cannot state to the court that he has spoken to the government except when we were in open hearings before this court, so in light of that, I would point that out to the court.

Thank you.

THE COURT: Thank you.

[14] In considering and now fashioning a condign and constitutional sentence, I have considered all relevant matters of fact and law, including the following. The plea agreement of the parties, including the parties' written stipulation of facts to the extent adopted by the defendant. I say that because the record is clear that during the providency hearing the defendant, with the assistance of counsel, took issue as to some of the factual averments contained in the stipulation of factual basis. And the court permitted him on that occasion, again with the assistance of counsel, to essentially disavow those specific and discrete facts.

The nature and circumstances of this serious drug-related felony offense, focusing on its real conduct; the history and characteristics of this offender; the sentences authorized or mandated by law under 18 U.S.C. Section 3551, and in this case, 21 U.S.C. Sections 846, 841(a)(1) and (b)(1)(A); the presentence report and its addenda; the purposes and goals of sentencing as prescribed by our Congress and codified

at 18 U.S.C. Section 3553(a)(2); the discrete factors which I must consider as a matter of law under 18 U.S.C. Sections 3582(a) and 3553(a)(1) through (7); the constitutional and relevant provisions of the now advisory United States Sentencing Guidelines, as they apply to this offense, offender, and all related and relevant conduct and circumstances; the kinds of sentence and the sentencing range established under those [15] advisory sentencing guidelines for this applicable category of offense, committed by this applicable category of defendant under 18 U.S.C. Section 3553(a)(4); the need to avoid unwarranted sentencing disparities by ensuring similar sentences for those who have committed similar crimes in similar ways; the pertinent policy statements of the United States Sentencing Commission; the need to impose sentences that reflect the principles and requirements of 18 U.S.C. Section 3553(a)(2); the advancement of the Congressional goals of honesty, uniformity and proportionality in sentencing; the principles and requirement at 18 U.S.C. Section 3553(a) to impose a sentence that is sufficient, but not greater than necessary, to achieve the Congressional goals and purposes of sentencing; the position of the probation department, the government, defense counsel and the defendant himself; the government's pending motion for full credit for acceptance of responsibility; and the government's Motion to Dismiss Count 2 of the indictment as to defendant Luis Altamirano-Quintero only, docket 225, filed the 12th day of June this year, both motions I intend to grant; the fact that this crime is subject to a statutory

mandatory minimum of not less than ten years nor more than life imprisonment, and finally, all reasons stated, arguments advanced, and authorities cited by all parties in interest, either in their papers, or during this sentencing hearing.

Having engaged in that comprehensive sentencing [16] analysis, I go on to make the following sentencing statement, which I must under 18 U.S.C. Section 3553(c).

Therefore, on this record considered as a whole, I now enter the following findings of fact, conclusions of law, judgment of conviction, sentence and orders.

First, my findings and conclusions. I approve, adopt and incorporate the many matters which I have considered and now noted for the record.

That neither the government nor the defendant has filed formal or substantive objections to the presentence report.

Therefore, pursuant to Federal Rules of Criminal Procedure 32(i)(3)(A), I accept the presentence report, including the advisory sentencing guideline applications and calculations as an integral part of my findings of fact.

That on June 20, last year, 2005, I conducted a change of plea hearing, during which the defendant, pursuant to his plea agreement, under Rule 11(c)(1)(B), voluntarily, knowingly, intelligently, and intentionally entered an unconditional plea of guilty to Count 1 of the two-count indictment, the crime of conspiracy to

possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. Sections 846 and 841(a)(1) and (b)(1)(A).

That for advisory purposes only, the 2004 edition of the United States Sentencing Commission Guidelines Manual has been consulted and considered by me in the imposition of [17] sentence.

That for advisory purposes only, consideration and application of all relevant and applicable advisory sentencing guideline provisions to this offense, offender, and all relevant and related conduct and circumstances, produces a total adjusted advisory offense level of 31, and an advisory criminal history category of I.

As a result, the sentencing guidelines are as follows: Imprisonment, 120 to 135 months, noting that this crime is subject to a mandatory minimum sentence of not less than 120 months; supervised release of five years, as established pursuant to statute; fines from $15,000 U.S. to $4 million U.S.

In the Plea Agreement and Stipulation of Facts Relevant to Sentencing, Court's Exhibit 1, the parties acknowledged that the defendant had expressed the intent to cooperate with the office of the United States Attorney for the District of Colorado by providing testimony, documents, and other information known to the defendant about the criminal wrongdoing of other persons.

The defendant in his plea agreement agreed that he shall cooperate fully with the government in the ways prescribed in that plea agreement. Again citing to Plea Agreement and Stipulation of Facts Relevant to Sentencing, Court's Exhibit 1, at page 2, paragraph C.

In that same plea agreement, the government reserved [18] the sole right to evaluate the nature and extent of the cooperation if any of the defendant, and to make the cooperation of the defendant, if any, known to the court at the time of sentencing.

At the time of the plea agreement, the defendant had not been debriefed. At that time, the parties stipulated that the defendant would submit to a proffer or interview by agents of the federal government between the date of the entry of the plea in June of 2005, and the first sentencing hearing in September of 2005.

Due to the actions of the defendant, that debriefing and that proffer did not occur. Had the defendant cooperated completely, had the defendant submitted to the debriefing and proffer included in the plea agreement, the government anticipated filing a motion under guideline Section 5K1.1, and the provisions of 18 U.S.C. Section 3553(e), requesting a downward departure for substantial assistance.

Because the defendant breached that portion of his plea agreement, the government has not filed any such motion. And there is no request to depart downward

from the guideline range based on substantial assistance.

The defendant requests that he be afforded the benefits of the so-called safety valve, which implicates 18 U.S.C. Section 3553(f). In turn, subsection F of Section 3553 has five components. No. 5 is at issue in request – in the context of [19] the request by the defendant.

Paragraph 5 of subsection F of Section 3553 provides in relevant part as follows, and I quote, "Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."

On this record, that fifth requirement has not been satisfied by the defendant, and therefore, the defendant is not entitled to safety valve relief under 18 U.S.C. Section 3553(f), and therefore the defendant's request for downward departure for a sentence beneath the statutory mandatory minimum should be denied.

After considering all the matters I noted earlier, after considering the effect of all relevant advisory sentencing guidelines on the offense, offender, and all related and relevant conduct and circumstances, and then alternatively and independently, after considering the discrete sentencing factors at 18 U.S.C. Section 3553(a)(1) through (7), I conclude ultimately that

the defendant should be sentenced to a term of imprisonment consistent with the statutory mandatory minimum of 120 months.

That such a sentence will satisfy the requirements of 21 U.S.C. Sections 846 and 841(a)(1) and (b)(1)(A); avoid unwarranted sentencing disparities; facilitate and reflect the [20] pertinent policy statements of the sentencing commission; reflect the seriousness of this drug-related felony offense; promote respect for the law; provide just punishment for the offense; afford adequate deterrence by protecting the public from further crimes committed by this defendant or others similarly situated or inclined; provide the defendant with needed educational or vocational training, or other correctional treatment in the most effective manner; advance the Congressional goals of honesty, uniformity and proportionality in sentencing, and preserve the principle and requirement that the sentence be sufficient but no greater than necessary to achieve the Congressional goals and purposes of sentencing.

That after considering the factors at 18 U.S.C. Sections 3013 and 3572(a), I find and conclude that the defendant is indigent and financially unable to pay a fine, therefore no fine should be imposed.

Therefore, it is ordered as follows: That the plea agreement of the parties as stated and presented in Court's Exhibits 1, 1A, 2 and 2A is formally approved; that the two aforementioned motions filed by the government are granted.

That accordingly, Count 2 of the indictment is dismissed with prejudice as to this defendant only.

That the request or motion by the defendant for safety valve relief, implicating 18 U.S.C. Section 3553(f), is respectfully denied.

[21] That judgment of conviction shall now enter on Count 1 of the indictment under Federal Rules of Criminal Procedure 32(k).

That pursuant to the Sentencing Reform Act of 1984, and the provisions of 18 U.S.C. Section 3621(a), and 21 U.S.C. Sections 846, 841(a)(1), and (b)(1)(A), it is the judgment and sentence of this court that the defendant, Luis Altamirano-Quintero, is committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120 months representing the statutory mandatory minimum for the crime and count of conviction.

That under 18 U.S.C. Section 3583, on release from imprisonment, the defendant shall be placed on supervised release for a term of five years.

That within 72 hours of his release from imprisonment, the defendant shall report in person to the U.S. Probation Department within the federal district to which he is released.

That while on supervised release, the defendant shall comply with all mandatory conditions of supervised release prescribed by law at 18 U.S.C. Section 3583(d), and shall comply also with all standard

conditions of supervised release imposed by this court.

And shall comply, finally, with the following special or explicit conditions of supervised release. The defendant shall not violate any federal, state, municipal, or local [22] statute, regulation or ordinance, or other type of law in any jurisdiction or place where he may be during the term of his supervised release.

The defendant shall not possess or use illegally controlled substances.

The defendant shall not possess or use any firearm or destructive device as those terms are defined by 18 U.S.C. Section 921.

The defendant shall cooperate fully in the collection of a sample of his DNA.

The defendant shall submit to one drug test within fifteen days of his release from imprisonment as directed by the probation department, and thereafter to at least two periodic tests for the use of a controlled substance as determined by the court.

If the defendant is removed or deported from this country, then he shall not return to this country illegally.

And finally, if the defendant is deported or removed from this country and returns legally, then he shall report to the nearest U.S. Probation Department within 72 hours of his lawful return to this country.

That no fine is imposed.

That pursuant to 18 U.S.C. Section 3013, the defendant shall pay forthwith a special victims fund assessment of $100 U.S.

[23] That presentence confinement shall be determined by the Bureau of Prisons under 18 U.S.C. Section 3585.

And finally, that the defendant is remanded to the custody of the United States Marshal for imposition and execution of sentence.

Mr. Altamirano, please be advised that you have the right to appeal this sentence to a higher court. If you want to appeal this sentence, your Notice of Appeal must be filed with the clerk of this District Court within ten days of the formal entry of judgment or that right to appeal is lost.

If you are unable to pay the costs of an appeal, you have the right to ask for permission to appeal as a poor person.

You have the right to be represented by an attorney. If you want an attorney but cannot afford one, then the court will appoint an attorney for you at the expense of the government.

And finally, if you request, the Clerk of the Court must prepare and file a Notice of Appeal on your behalf immediately.

Very well. Further business by the government.

Mr. Boma.

MR. BOMA: Nothing, your Honor. Thank you.

THE COURT: Further business by the defense. Mr. Stanton.

MR. STANTON: Yes, your Honor.

[24] I will start with the last point the court made, and that would be the request by my client that the Clerk of the Court prepare and file the Notice of Appeal on his behalf immediately.

I haven't read the letter that my client has put before the court, but we did meet, and after we reviewed the presentence report, obviously under orders of the court, and I think he agrees that the conflict is irreconcilable.

I don't believe that me preparing a Notice of Appeal would do anything except to perpetuate any further conflict that we would have.

I don't think he is disagreeing with me. He indicated he just wanted to send a letter to the court. I only assumed that letter is probably that.

So, for me to have any further involvement in this case would only complicate issues for me and probably him So I would request the court to first, back to the sentencing, to designate my client to California, particularly near L.A.

He has requested, through me, that the government return all of his property. I guess that's appropriate.

And also he is requesting, and by my calculation, credit for time served 729 days. I know the Bureau of Prisons makes that determination, but these are the requests that he wanted me to do.

Now back to my Motion to Withdraw.

[25] THE COURT: Let me finish up sentencing first.

MR. STANTON: Okay. Thank you.

THE COUPT: I am surprised at the request following an extended opportunity to counsel and the defendant to be heard about matters raised by or inherent to sentencing.

However, in reverse order, the court is not going to react to an oral motion for the nebulous return of unspecified property.

Second, the court will respectfully deny counsel's oral request that this court recommend specific placement to the Bureau of Prisons to a facility in California. The Bureau of Prisons pays absolutely no attention to the recommendations of at least this court, and I don't intend to engage in what would be an exercise in futility.

And what was the third request? That the Clerk of the Court prepare and file on the defendant's behalf a Notice of Appeal?

MR. STANTON: Yes, sir.

THE COURT: That request will be granted. However, I can tell you that that process is awkward and cumbersome, and frankly discouraged by the Court of Appeals itself. But we shall comply with the request of the defendant.

Now, back to your Motion to Withdraw.

MR. STANTON: Thank you, your Honor.

As the court may Or may not have observed, my client [26] has not entered in any type of conversation with me at this point. I didn't get a copy of his letter. It just shows that the problem is not getting better. It has reached the point where it only is going to cause further complications, particularly in my life, Judge, and I don't see how I can assist the court in any fashion, so I don't see how I can be of any further assistance to Mr. Altamirano.

I respectfully request the court to allow me to withdraw, which I need your permission under CJA.

THE COURT: Has a copy of your Motion to Withdraw, speaking of docket 226 filed today's date, been served on or otherwise provided to Mr. Altamirano?

MR. STANTON: Yes, your Honor.

THE COURT: Have you had at least the opportunity to attempt to discuss the issues raised by or inherent to your second Motion to Withdraw with him?

MR. STANTON: I discussed it with him at our last meeting, your Honor, at which time he agreed, and he indicated he was going to be forwarding documentation to the court to support that. I don't know if that letter does that or not.

THE COURT: Very well. Thank you.

Mr. Altamirano, under consideration is the Motion to Withdraw filed by Mr. Stanton today's date. Have you received and read a copy of that Motion to Withdraw?

THE INTERPRETER: It was given to me just now.

[27] MR. STANTON: At the beginning.

THE INTERPRETER: Yes. I haven't had a chance to read it yet, but I am in agreement with him to withdrawing. I haven't had a chance to do so, but I intended to present a letter myself about this matter.

THE COURT: Very well.

Opportunity for record by the government, Mr. Boma.

MR. BOMA: No position, your Honor.

THE COURT: Very well. On this record, considered as a whole, the Motion to Withdraw, docket 226, filed the 16th day of June this year, by Boston H. Stanton, Jr., is granted effective forthwith. The court thanks Mr. Stanton for his service to the defendant and court in difficult circumstances.

MR. STANTON: Thank you, your Honor.

THE COURT: You are welcome.

Further business, Mr. Stanton.

MR. STANTON: Nothing further, your Honor. Thank you.

THE COURT: Thank you. Then please close the record in this case, with a special thanks to our interpreter, Ms. Davis. We are in recess

(Proceedings concluded at 3:30 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 25th day of July, 2006.

/s/ Suzanne M. Claar
Suzanne M. Claar, CSR, RPR